

83 - 2146

Office - Supreme Court, U.S.

FILED

JUN 28 1984

ALEXANDER L. STEVAS.

CLERK

No.

In The
Supreme Court of the United States

October Term, 1983

RICHARD WILSON and MARTIN VIGIL,

Petitioners,

vs.

GARY GARCIA,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

BEN M. ALLEN

DIANE FISHER

BRUCE HALL

RODEY, DICKASON, SLOAN, AKIN
& ROBB, P.A.

Post Office Box 1888

Albuquerque, New Mexico 87103

Telephone: (505) 765-5900

Counsel for Petitioners

June 28, 1984

QUESTIONS PRESENTED

1. When an action for the deprivation of constitutional rights is brought in federal court under 42 U.S.C. § 1983, may the federal court disregard the limitations period held applicable by the state's highest court to an identical action brought in state court under 42 U.S.C. § 1983, where the limitations period applied in state court is neither too short nor inconsistent with the Constitution and laws of the United States?
2. If the federal court may disregard the limitations period applied by the state's highest court to § 1983 actions filed in state court, what are the characteristics of an action under 42 U.S.C. § 1983 that the federal court must consider in identifying the most closely analogous cause of action and its applicable statute of limitations as required under *Board of Regents v. Tomanio*, 446 U.S. 478 (1980), and *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975)?

TABLE OF CONTENTS

	Page
Opinions Below	2
Jurisdiction	2
Constitutional Provisions and Statutes	2
Statement of the Case	2
Reasons for Granting the Petition:	
I. The Tenth Circuit's Approach to the Statute of Limitations Issue Implicates Established Principles of Federalism and Creates an Irreconcilable Conflict Between Federal and State Courts in New Mexico.	6
II. The Tenth Circuit's Refusal to Defer to State Law Conflicts with the Decisions of Other Circuits and Highlights the Dispute, Yet Unaddressed by this Court, over the Application to § 1983 Actions of Statutes of Limitations Selected by State Law.	9
III. Identification of the Considerations Relevant to the Characterization of a Civil Rights Claim for the Purpose of Selecting the Most Analogous Cause of Action Is an Issue Raised by the Decision Below Which Has Not Yet Been Addressed by this Court.	13
Conclusion	20
Appendix A—Opinion of the United States Court of Appeals for the Tenth Circuit, March 30, 1984)	App. 1
Appendix B—Memorandum Opinion of the District Court for the District of New Mexico, July 21, 1982	App. 28
Appendix C—Constitutional provisions and statutes involved	App. 46

TABLE OF AUTHORITIES

	Pages
CASES:	
<i>Aitchison v. Raffiani</i> , 708 F.2d 96 (3d Cir. 1983)	5, 11, 14, 19
<i>Almond v. Kent</i> , 459 F.2d 200 (4th Cir. 1972)	15
<i>Bauserman v. Blunt</i> , 147 U.S. 647 (1893)	11
<i>Beard v. Robinson</i> , 563 F.2d 331 (7th Cir. 1977), cert. denied, 438 U.S. 907 (1978)	16
<i>Board of Regents v. Tomanio</i> , 446 U.S. 478 (1980)	3, 7, 11, 13
<i>Bonner v. City of Prichard</i> , 661 F. 2d 1206 (11th Cir. 1981)	18
<i>Braden v. Texas A & M University System</i> , 636 F.2d 90 (5th Cir. 1981)	15
<i>Burns v. Sullivan</i> , 619 F.2d 99 (1st Cir.), cert. denied, 449 U.S. 893 (1980)	14
<i>Clark v. Musick</i> , 623 F.2d 89 (9th Cir. 1980)	10, 17
<i>Cole v. Cole</i> , 633 F.2d 1083 (4th Cir. 1980)	15
<i>DeVargas v. State ex rel. New Mexico Department of Corrections</i> , 97 N.M. 447, 640 P.2d 1327 (Ct. App. 1981)	3, 7, 8
<i>DeVargas v. State ex rel. New Mexico Department of Corrections</i> , 97 N.M. 563, 642 P.2d 166 (1982)	3, 4, 5, 7, 8
<i>Donovan v. Reinbold</i> , 433 F.2d 738 (9th Cir. 1970)	19
<i>Erie Railroad Co. v. Tompkins</i> , 304 U.S. 64 (1938)	9
<i>Garcia v. Wilson</i> , 731 F.2d 640 (10th Cir. 1984)	4, 19, 20
<i>Garmon v. Foust</i> , 668 F.2d 400 (8th Cir.), cert. denied, 456 U.S. 998 (1982)	17

TABLE OF AUTHORITIES—Continued

	Pages
<i>Gashgai v. Leibowitz</i> , 703 F.2d 10 (1st Cir. 1983)	14
<i>Green v. Ten Eyck</i> , 572 F.2d 1233 (8th Cir. 1978)	19
<i>Holden v. Commission Against Discrimination</i> , 671 F.2d 30 (1st Cir.), <i>cert. denied</i> , 459 U.S. 843 (1982)	14
<i>International Union v. Hoosier Cardinal Corp.</i> , 383 U.S. 696 (1966)	7
<i>Jackson v. City of Bloomfield</i> , 731 F.2d 652 (10th Cir. 1984)	18
<i>Johnson v. Railway Express Agency, Inc.</i> , 421 U.S. 454 (1975)	7, 8
<i>Jones v. Orleans Parish School Board</i> , 688 F.2d 342 (5th Cir.), <i>cert. denied</i> , 103 S.Ct. 2420 (1983)	15
<i>Kilgore v. City of Mansfield</i> , 679 F.2d 632 (6th Cir. 1982)	16
<i>Kosikowski v. Bourne</i> , 659 F.2d 105 (9th Cir. 1981)	5, 10, 17
<i>Lavellee v. Listi</i> , 611 F.2d 1129 (5th Cir. 1980)	15
<i>McClam v. Barry</i> , 697 F.2d 366 (D.C. Cir. 1983)	5, 18
<i>McGhee v. Ogburn</i> , 707 F.2d 1312 (11th Cir. 1983)	18
<i>Madison v. Wood</i> , 410 F.2d 564 (6th Cir. 1969)	16
<i>Mason v. Owens-Illinois, Inc.</i> , 517 F.2d 520 (6th Cir. 1975)	16
<i>Meyers v. Pennyback Woods Home Ownership Association</i> , 559 F.2d 894 (3d Cir. 1977)	11
<i>Moore v. El Paso County</i> , 660 F.2d 586 (5th Cir. 1981), <i>cert. denied</i> , 459 U.S. 822 (1982)	15
<i>Morrell v. City of Picayune</i> , 690 F.2d 469 (5th Cir. 1982)	15, 19

TABLE OF AUTHORITIES—Continued

	Pages
<i>Movement for Opportunity & Equality v. General Motors Corp.</i> , 622 F.2d 1235 (7th Cir. 1980)	17
<i>Pauk v. Board of Trustees</i> , 654 F.2d 856 (2d Cir. 1981), <i>cert. denied</i> , 455 U.S. 1000 (1982)	14, 19
<i>Polite v. Diehl</i> , 507 F.2d 119 (3d Cir. 1974)	5, 11
<i>Powell v. St. Louis Dairy Co.</i> , 276 F.2d 464 (8th Cir. 1960)	11
<i>Rose v. Rinaldi</i> , 654 F.2d 546 (9th Cir. 1981)	17
<i>Rubin v. O'Koren</i> , 644 F.2d 1023 (5th Cir. 1981)	16
<i>Runyon v. McCrary</i> , 427 U.S. 160 (1976)	7
<i>Sacks Brothers Loan Co. v. Cunningham</i> , 578 F.2d 172 (7th Cir. 1978)	17, 19
<i>St. Louis & San Francisco Railroad Co. v. Quinette</i> , 251 F. 773 (8th Cir. 1918)	11
<i>Shaw v. McCorkle</i> , 537 F.2d 1289 (5th Cir. 1976)	11, 15
<i>Shouse v. Pierce County</i> , 559 F.2d 1142 (9th Cir. 1977)	17
<i>White v. United Parcel Service</i> , 692 F.2d 1 (5th Cir. 1982), <i>cert. denied</i> , 104 S. Ct. 186 (1983)	16
<i>Williams v. Walsh</i> , 558 F.2d 667 (2d Cir. 1977)	14
<i>Zuniga v. AMFAC Foods, Inc.</i> , 580 F.2d 380 (10th Cir. 1978)	18
MISCELLANEOUS:	
N.M. Stat. Ann. § 37-1-4 (1978)	2, 4
N.M. Stat. Ann. § 37-1-8 (1978)	2, 5, 8
N.M. Stat. Ann. § 41-4-12 (1978)	2, 3, 4, 8
N.M. Stat. Ann. § 41-4-15 (1978)	2, 4, 7, 8, 19

TABLE OF AUTHORITIES—Continued

	Pages
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1292(b)	4
42 U.S.C. § 1983.....	passim
42 U.S.C. § 1988	2, 6
New Jersey Tort Claims Act, N.J. Stat. Ann. § 59:8-8 (1982)	11

No.

In The

Supreme Court of the United States**October Term, 1983**

RICHARD WILSON and MARTIN VIGIL,

Petitioners,

vs.

GARY GARCIA,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

Petitioners Richard Wilson and Martin Vigil petition the United States Supreme Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this case on March 30, 1984.

OPINIONS BELOW

The opinion of the court of appeals (App. A) is reported at 731 F.2d 640 (10th Cir. 1984). The opinion of the district court (App. B) is not reported.

JURISDICTION

The judgment of the court of appeals (App. A) was entered on March 30, 1984. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

This Petition involves consideration of the following statutory provisions: 42 U.S.C. § 1983, 42 U.S.C. § 1988, N.M. Stat. Ann. § 41-4-12 (1978), N.M. Stat. Ann. § 41-4-15 (1978), N.M. Stat. Ann. § 37-1-8 (1978), and N.M. Stat. Ann. § 37-1-4 (1978). The full text of each of these statutes is set forth in the Appendix.

STATEMENT OF THE CASE

Respondent Gary Garcia brought this action under 42 U.S.C. § 1983 against Petitioners Richard Wilson, a former New Mexico State Police officer, and Martin Vigil,

Chief of the New Mexico State Police (the Officers), seeking money damages for the alleged deprivation of constitutional rights arising out of Garcia's arrest by Officer Wilson. Garcia alleged that Officer Wilson used excessive force in connection with the arrest and that Chief Vigil failed to provide adequate supervision. According to the complaint, the incident in question occurred on April 27, 1979. This action, however, was not filed until January 28, 1982—more than two years later.

In response to Garcia's complaint, the Officers filed motions to dismiss on the ground that the action was barred by the applicable statute of limitations. In support of their motions, the Officers relied on the holdings and reasoning of *DeVargas v. State ex rel. New Mexico Department of Corrections*, 97 N.M. 447, 640 P.2d 1327 (Ct. App. 1981), and *DeVargas v. State ex rel. New Mexico Department of Corrections*, 97 N.M. 563, 642 P.2d 166 (1982). In the *DeVargas* cases, New Mexico's highest appellate courts reviewed the guidelines for selecting the statute of limitations applicable to an action brought under § 1983. Reasoning that under *Board of Regents v. Tomanio*, 446 U.S. 478 (1980), a court must apply the limitations period applicable to the state cause of action most closely analogous to the action brought under § 1983, those courts ruled that the most closely analogous state cause of action in New Mexico to a police brutality action brought under § 1983 is set forth in section 41-4-12 of the New Mexico statutes, N.M. Stat. Ann. § 41-4-12 (1978), which provides a cause of action against New Mexico law enforcement officers for assault, battery, or the deprivation of constitutional rights. A § 1983 police brutality claim against New Mexico law enforcement officers

brought in state court is therefore governed by the two-year limitations period applicable to claims asserted under section 41-4-12. N.M. Stat. Ann. § 41-4-15 (1978); *DeVargas*, 97 N.M. at 564, 642 P.2d at 167.

On July 21, 1982, the trial court issued its Order denying the Officers' motions. In its Opinion (App. B at App. 41-43), the court refused to follow the state court decisions in *DeVargas*, holding instead that a § 1983 action is *sui generis* and not analogous to any state cause of action, including one brought under section 41-4-12. (App. B at App. 43). The trial court characterized Garcia's claim as an "action on a statute" and held that, since New Mexico has no statute of limitations specifically applicable to statutory actions, Garcia's claim would be governed by New Mexico's four-year residual statute of limitations applicable to an action not subject to any other specified period of limitations. N.M. Stat. Ann. § 37-1-4 (1978).

Recognizing the conflict between its Opinion and the position adopted by New Mexico's highest courts, the trial court certified the question for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). On January 6, 1983, the Court of Appeals for the Tenth Circuit granted the Officers' request for leave to appeal. The matter was argued and submitted to a three-judge panel on March 7, 1983, but the submission order was vacated on May 23, 1983. Thereafter, on the court's own motion, the appeal was submitted to the full court for an *en banc* determination.

On March 30, 1984, the Court of Appeals sitting *en banc* issued its Memorandum Opinion and Order of Judgment. *Garcia v. Wilson*, 731 F.2d 640 (10th Cir. 1984). In its Opinion, the court rejected the trial court's char-

acterization of § 1983 as an action on a statute. Nevertheless, the Court of Appeals affirmed the order of the trial court refusing to dismiss the complaint. Using this case as an opportunity to survey the conflicting decisions within and outside the Circuit on the applicability of state statutes of limitations to § 1983 actions, the Tenth Circuit adopted the view that all § 1983 claims within the Circuit should be uniformly characterized for statute of limitations purposes as actions for injury to personal rights. Accordingly, the court held that the appropriate limitations period for all § 1983 actions filed in New Mexico was that set forth in section 37-1-8 of the New Mexico statutes, N.M. Stat. Ann. § 37-1-8 (1978), which provides a three-year limitations period for actions alleging "an injury to the person or reputation of any person." Consequently, the court concluded that Garcia's complaint was timely filed.

In its Opinion, the Tenth Circuit acknowledged that its conclusion was at variance with the New Mexico Supreme Court's holding in *DeVargas*, but declined to follow that decision. The Tenth Circuit also acknowledged that its approach to the statute of limitations issue conflicted with that adopted by at least three other circuits. *See, e.g., McClam v. Barry*, 697 F.2d 366 (D.C. Cir. 1983) (holding that § 1983 claims must be characterized for statute of limitation purposes by the underlying facts alleged in the plaintiff's complaint); *Aitchison v. Raffiani*, 708 F.2d 96, 101 (3d Cir. 1983) (reaffirming *Polite v. Diehl*, 507 F.2d 119, 122 (3d Cir. 1974) (*en banc*), which held that the limitations period to be applied is the statute that would have been applied if the same or a similar action were filed in state court); *Kosikowski v. Bourne*, 659 F.

2d 105 (9th Cir. 1981) (holding that a state's articulation of the limitations period specifically applicable to § 1983 claims is determinative of the federal issue and relieves the federal court from the task of characterizing a civil rights claim). As will be demonstrated below, the Tenth Circuit's decision, in which the court took pains to identify and reject the views of so many other courts, was erroneous in its own right. Moreover, this case provides an ideal opportunity to clarify an important area of § 1983 jurisprudence.

—o—

REASONS FOR GRANTING THE PETITION

I. The Tenth Circuit's Approach To The Statute Of Limitations Issue Implicates Established Principles Of Federalism And Creates An Irreconcilable Conflict Between Federal And State Courts In New Mexico.

Congress has not provided a specific limitations period to govern actions brought under § 1983. Section 1988 of title 42, however, provides that where the provisions of that title are "deficient in the provisions necessary to furnish suitable remedies . . . the common law, as modified and changed by the constitution and statutes of the State[s] . . . shall be extended to and govern" federal courts in the trial and disposition of any action brought under title 42 as long as the state law applied is not inconsistent with the Constitution or laws of the United States. Thus, this Court has consistently held that in the absence of a federal statute of limitations, § 1988 requires federal courts to apply to an action brought under § 1983 the state statute of limitations which would be applicable to the most

closely analogous state cause of action, unless that state limitations period is inconsistent with the Constitution and laws of the United States. *Board of Regents v. Tomanio*, 446 U.S. 478 (1980); see also *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 462 (1975).

While the characterization of an action for the purpose of selecting the appropriate state limitations period is a question of federal law, the characterization that state law would impose may not be rejected unless that characterization is "inconsistent with the constitution and laws of the United States." *Board of Regents v. Tomanio*, 446 U.S. at 485; see *International Union v. Hoosier Cardinal Corp.*, 383 U.S. 696, 706 (1966). Thus, when the state has adopted a characterization of a § 1983 action which fits within the framework of its own system of limitations, and which does not conflict with federal law or policy, the federal court should defer to the state's characterization and to its selection of a limitation period. See *Board of Regents v. Tomanio*, *supra*; *Runyon v. McCrary*, 427 U.S. 160 (1976); *Johnson v. Railway Express Agency, Inc.*, *supra*.

A straightforward application of this established rule leads to a result opposite the one reached by the Tenth Circuit. The New Mexico Supreme Court has held that a § 1983 action for police brutality brought in state court is governed by the two-year statute of limitations set forth in N.M. Stat. Ann. § 41-4-15 (1978). *DeVargas v. State ex rel. New Mexico Department of Corrections*, 97 N.M. 563, 642 P.2d 166 (1982); see *DeVargas v. State ex rel. New Mexico Department of Corrections*, 97 N.M. 447, 640 P.2d 1327 (Ct. App. 1981). The Supreme Court in *DeVargas* held that the state cause of action "most closely analogous" to the § 1983 action before them was an action

under section 41-4-12 of the New Mexico statutes, N.M. Stat. Ann. § 41-4-12 (1978) (hereinafter "section 12"), which, like § 1983, imposes liability for the "deprivation of any rights, privileges or immunities secured by the constitution and laws of the United States. . . ." The court therefore applied to that case the two-year limitations period set forth in § 41-4-15 which is applicable to actions brought under section 12.

Despite the admonition of this Court that a federal court must "[rely] on the State's wisdom in setting a limit . . . on the prosecution" of a federal civil rights claim, *Johnson v. Railway Express Agency, Inc.*, 421 U.S. at 464, the court of appeals refused the guidance of the New Mexico courts in *DeVargas*. The court ruled instead that all actions filed under § 1983 in federal court would be governed not by the two-year period set forth in section 41-4-15, but by the three-year period set forth in section 37-1-8 of the New Mexico statutes, N.M. Stat. Ann. § 37-1-8 (1978), which governs actions for injuries to the person.

The Tenth Circuit's refusal to follow *DeVargas* and its failure to give deference to the express intent of the State of New Mexico implicates that fundamental principle of federalism recognized in *Johnson v. Railway Express Agency*. Rather than seeking to harmonize § 1983 jurisprudence with comparable state law, the Tenth Circuit's decision creates an irreconcilable conflict between federal and state courts. In the *DeVargas* case, New Mexico's highest court expressly adopted a two-year limitations period for a § 1983 action involving police brutality. The Tenth Circuit now has adopted a three-year limitations period for exactly the same claim. As a result, the choice of the statute of limitations which will govern a § 1983

action against law enforcement officers in New Mexico depends solely on whether the action is filed in federal or state court. Moreover, the longer limitations period adopted by the Tenth Circuit allows forum-shopping litigants in New Mexico to avoid the express decision of the state's lawmakers as to the proper balance to be struck between the interests of individuals injured by police misconduct and the interests of the state. This is precisely the sort of result federal courts have attempted to discourage since *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

The conflict between the decision of the court of appeals and the decision of New Mexico's highest court presents a question of vital importance in our dual system of federal and state courts. This conflict provides a sufficient ground for this Court to grant a writ of certiorari to review the decision below.

II. The Tenth Circuit's Refusal To Defer To State Law Conflicts With The Decisions Of Other Circuits And Highlights The Dispute, Yet Unaddressed By This Court, Over The Application To § 1983 Actions Of Statutes Of Limitations Selected By State Law.

The Tenth Circuit, in its decision, declined to apply to this action the two-year limitations period selected by New Mexico's highest court as the limitations period applicable to identical § 1983 action filed in New Mexico state courts. This decision conflicts with the decisions of several circuits.

The Court of Appeals for the Ninth Circuit, for example, holds that once a state has specified a statute of limitations for § 1983 actions, a federal court must accept

the state's decision unless to do so would violate federal law or policy. *Kosikowski v. Bourne*, 659 F.2d 105 (9th Cir. 1981). In *Kosikowski*, the Ninth Circuit held that the two-year statute of limitations contained in the Oregon Tort Claims Act governed an action brought in federal court under 42 U.S.C. § 1983. Although that court previously had ruled that § 1983 actions filed in Oregon were governed by the six-year limitations period applicable to causes of action created by statute, *Clark v. Musick*, 623 F.2d 89 (9th Cir. 1980), the court in *Kosikowski* held that once a state has determined that a particular limitations period applies to actions filed under § 1983, a federal court need not and should not go further. The court therefore ruled that it was bound by legislation enacted after its decision in *Clark* by which the state legislature defined the word "tort" when used in the state tort claims act to include specifically any violation of § 1983.

This precise expression of the intent of the Oregon Legislature makes unnecessary a resort to a characterization of appellants' cause of action in the manner employed by this court in *Clark v. Musick*, 623 F.2d 89 (9th Cir. 1980). Such characterization serves no purpose other than to provide guidance in the selection of the applicable state statute. When the state has expressly made that selection the federal courts should accept it unless to do so would frustrate the purposes served by the federal law upon which the plaintiff's claims rest.

659 F.2d at 107.¹

¹ The fact that in New Mexico the selection of the statute of limitations applicable to a § 1983 police brutality action was made by the judiciary and not by the legislature is a distinction without a difference: an interpretation of New Mexico

(Continued on next page)

Similarly, both the Third Circuit and the Fifth Circuit have held that the appropriate statute of limitations to apply in a § 1983 action is the one that a state court would have applied had the action been filed in that court. *Aitchison v. Raffiani*, 708 F.2d 96 (3d Cir. 1983); *Polite v. Diehl*, 507 F.2d 119, 122 (3d Cir. 1974) (en banc); see also *Meyers v. Pennyback Woods Home Ownership Association*, 559 F.2d 894, 900 (3d Cir. 1977); *Shaw v. McCorkle*, 537 F.2d 1289 (5th Cir. 1976). The case of *Aitchison v. Raffiani*, for instance, involved a claim brought under § 1983 for damages arising out of the plaintiff's allegedly wrongful discharge from his employment. Named as defendants in the case were the mayor and members of the borough council of Fair Lawn, New Jersey, the borough manager and the borough itself. The defendants moved to dismiss the action on the ground, *inter alia*, that it was barred by the two-year limitations period set forth in the New Jersey Tort Claims Act, N.J. Stat. Ann. § 59:8-8 (1982). The district court granted the defendants' motion, and the Third Circuit affirmed.

Noting the admonition of this Court in *Board of Regents v. Tomanio*, 446 U.S. at 484, that the application of state statutes of limitations to actions filed in federal court under § 1983 is not permissive but mandatory, the court

(Continued from previous page)

law by the New Mexico Supreme Court binds a federal court interpreting New Mexico law as surely as any statute passed by the New Mexico legislature. *Bauserman v. Blunt*, 147 U.S. 647 (1893) (holding that federal courts are bound by decisions of a state's highest court interpreting the scope of a state statute of limitations); *Powell v. St. Louis Dairy Co.*, 276 F.2d 464 (8th Cir. 1960); *St. Louis & San Francisco Railroad Co. v. Quinette*, 251 F. 773 (8th Cir. 1918).

in *Aitchison* reasoned that since the two-year limitations period on which the defendants relied would have been applied to the plaintiff's action had it been brought in a New Jersey state court, that same period of limitations must be applied to the action when filed in federal court. The court held that a state's limitations scheme provides the framework within which a § 1983 claim must be examined when selecting an applicable statute of limitations, and recognized that it was reasonable for "a state to assume that the public interest in the repose of claims against a governmental agency is worthy of special consideration." 708 F.2d at 103.

In the instant case, there is no doubt concerning New Mexico's position regarding the most analogous state cause of action and the appropriate limitations period for police brutality claims under § 1983. Moreover, there can be no serious contention, and neither the plaintiff nor the courts below have made one, that the limitations period that New Mexico law would impose (two years) is either unreasonable or inconsistent with the purposes and policies of federal law. The court below declined to follow New Mexico law simply because of its own objections to New Mexico's method of characterizing an action brought under § 1983.

Since the Tenth Circuit in the instant case specifically rejected the statute of limitations which would have been applied to this action had it been brought in state court, the decision below creates an irreconcilable conflict among the Third, Fifth, Ninth and Tenth Circuits. The conflict among the circuits focuses on one of the most important and current issues in § 1983 litigation, that is, whether a federal court may disregard the limitations period that

state law would impose where the limitations period applied by state law is neither too short nor inconsistent with the Constitution and laws of the United States. The importance of this question and the conflict of the circuits on this issue justify the grant of certiorari to review the decision below.

III. Identification Of The Considerations Relevant To The Characterization Of A Civil Rights Claim For The Purpose Of Selecting The Most Analogous Cause Of Action Is An Issue Raised By The Decision Below Which Has Not Yet Been Addressed By This Court.

While it is undisputed that a federal court must apply to a § 1983 action the limitations period applicable to the "most closely analogous" cause of action, *Board of Regents v. Tomanio*, this Court has never identified the considerations which are relevant to characterizing a civil rights claim and to determining whether a state cause of action is analogous to that claim. Thus, even if a federal court is allowed to disregard a state's choice of limitations period where the state's choice is neither too short nor inconsistent with federal law, this Court should nevertheless review the decision below because it raises a critical question, which has not yet been addressed by this Court and which for years has divided the many circuits, namely "what considerations are relevant to the process of characterizing a civil rights claim for the purpose of selecting the most closely analogous cause of action and its applicable statute of limitations?" The circuits have failed to agree among themselves on the answer to this question, and their hopelessly conflicting decisions vary from circuit to circuit and sometimes even from panel to panel.

The First Circuit characterizes § 1983 claims for the purpose of selecting statutes of limitations on the basis of the underlying facts of each case and the type of relief sought, analogizing each action to a specific common law tort. *Gashgai v. Leibowitz*, 703 F.2d 10 (1st Cir. 1983) (alleged state deprivation of reputation and ability to practice medicine most analogous to defamation and "false light" invasion of privacy); *Burns v. Sullivan*, 619 F.2d 99, 106 (1st Cir.), *cert. denied*, 449 U.S. 893 (1980); *see also, Holden v. Commission Against Discrimination*, 671 F.2d 30 (1st Cir.), *cert. denied*, 459 U.S. 843 (1982).

The Second Circuit, on the other hand, characterizes § 1983 claims as actions on a liability created by statute. *Pauk v. Board of Trustees*, 654 F.2d 856, 866 (2d Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982). The court in *Pauk* refused to find § 1983 claims analogous to common law torts, stating that "[w]hile some § 1983 claims have counterparts in actions at common law, the constitutional tort remedied by § 1983 is 'significantly different from' state torts. . . ." *Id.* (quoting *Monroe v. Pape*, 365 U.S. 167, 196 (1961) (Harlan, J., concurring)). In the absence of a limitations period specifically applicable to statutory actions, however, the Second Circuit has applied the limitations period applicable to actions for personal injuries. *Williams v. Walsh*, 558 F.2d 667, 670 (2d Cir. 1977).

The Third Circuit examines "[t]he essential nature of the federal claim, including the relief sought and the type of injury alleged . . . 'within the scheme created by the various state statutes of limitations.'" *Aitchison v. Raffiani*, 708 F.2d at 101 (quoting *Davis v. United States Steel Supply*, 581 F.2d 335, 337 (3d Cir. 1978)) (applying New Jersey Tort Claims Act two-year limitations). Thus,

the Third Circuit defines the federal cause of action in terms of factually similar state actions as set out in various state limitations schemes.

The Fourth Circuit for the most part follows the approach adopted below and characterizes all § 1983 actions as actions for personal injuries. *Almond v. Kent*, 459 F.2d 200 (4th Cir. 1972). In cases filed in federal courts sitting in North Carolina, however, the Fourth Circuit applies the state period of limitations applicable to actions for liability created by statute. *Cole v. Cole*, 633 F.2d 1083, 1092 (4th Cir. 1980).

The Fifth Circuit depends "substantially on state law in categorizing the essential nature of the claim presented. . . ." *Shaw v. McCorkle*, 537 F.2d at 1293. Thus, that court characterizes § 1983 claims by reference to similar state law actions. *See Morrell v. City of Picayune*, 690 F.2d 469 (5th Cir. 1982) (assault by police officer not governed by Mississippi one-year statute because under Mississippi law such is not mere assault and battery but breach of sheriff's official duty); *Lavellee v. Listi*, 611 F.2d 1129 (5th Cir. 1980) (Louisiana one-year assault statute of limitations applied in § 1983 action). The Fifth Circuit nonetheless concluded in an employment termination case that all § 1983 causes of action are essentially tortious in nature, refusing to apply to that case the period of limitations applicable to a state law action arising out of an employment contract. *Braden v. Texas A & M University System*, 636 F.2d 90, 92 (5th Cir. 1981). *See also Jones v. Orleans Parish School Board*, 688 F.2d 342 (5th Cir.) (employment termination claim under §§ 1981, 1983 held tortious in Louisiana), *cert. denied*, 103 S. Ct. 2420 (1983); *Moore v. El Paso County*, 660 P.2d 586 (5th

Cir. 1981) (same in Texas), *cert. denied*, 459 U.S. 822 (1982); *Rubin v. O'Koren*, 644 F.2d 1023 (5th Cir. 1981) (same in Alabama). Despite its holdings in these cases, however, the court did apply a state statute governing unwritten employment contracts to a § 1981 claim in *White v. United Parcel Service*, 692 F.2d 1 (5th Cir. 1982) (Mississippi), *cert. denied*, 104 S. Ct. 186 (1983). Unconstitutional employment termination is thus viewed as tortious in Texas, Alabama, and Louisiana, and contractual in Mississippi.

The Sixth Circuit's approach to characterizing civil rights claims varies according to available state statutes of limitations. In an employment discrimination suit in Michigan, the court stated that the essence of a § 1983 action is "a claim to recover damages for injury wrongfully done to the person." *Madison v. Wood*, 410 F.2d 564, 567 (6th Cir. 1969). In an employment discrimination suit in Ohio, however, the court applied the statute of limitations governing a liability created by statute. *Mason v. Owens-Illinois, Inc.*, 517 F.2d 520 (6th Cir. 1975). To add to the confusion, the Sixth Circuit, in *Kilgore v. City of Mansfield*, 679 F.2d 632 (6th Cir. 1982), refused to characterize a § 1983 action based on false arrest and malicious prosecution as an action on a liability created by statute, and instead applied to that case the limitations period governing factually similar common law torts.

The Seventh Circuit has attempted to adopt one limitations period to be uniformly applied to all civil rights claims. *Beard v. Robinson*, 563 F.2d 331 (7th Cir. 1977), *cert. denied*, 438 U.S. 907 (1978) (selecting limitations period applicable to statutory actions). That court, how-

ever, has found it impossible to do so given the differing statutes of limitations in various states. *See, e.g., Movement for Opportunity & Equality v. General Motors Corp.*, 622 F.2d 1235, 1242-43 (7th Cir. 1980) (Indiana two-year personal injury statute applied to § 1981 claim); *Sacks Brothers Loan Co. v. Cunningham*, 578 F.2d 172, 176 (7th Cir. 1978) (Indiana five-year statute governing actions against a public officer applied to § 1983 action against tax assessor).

The Eighth Circuit has explicitly rejected the approach, taken by several other circuits, of characterizing a claim based on its underlying facts, and holds that § 1983 actions are to be characterized as statutory actions. *Garmmon v. Foust*, 668 F.2d 400 (8th Cir.) (en banc), *cert. denied*, 456 U.S. 998 (1982). The Eighth Circuit therefore applies to a § 1983 action either the state statute of limitations applicable to actions on a statute, or, if the state has no such statute, the state's residual limitations period. *Id.*

In the absence of a state-selected statute of limitations, *see Kosikowski*, the Ninth Circuit has applied to § 1983 actions the period of limitations applicable to actions for a liability created by statute. *Clark v. Musick*, 623 F.2d at 92. In states which have not enacted a limitations period specifically applicable to "actions on a statute," however, the Ninth Circuit has characterized a civil rights claim as a claim for injuries to the person. *Rose v. Rinaldi*, 654 F.2d 546 (9th Cir. 1981); *Shouse v. Pierce County*, 559 F.2d 1142, 1146-47 (9th Cir. 1977).

The Tenth Circuit, in its decision below, abandoned its previous policy of characterizing a civil rights action

in light of the underlying facts of the claim, see *Zuniga v. AMFAC Foods, Inc.*, 580 F.2d 380 (10th Cir. 1978), and *Jackson v. City of Bloomfield*, 731 F.2d 652 (10th Cir. 1984), and adopted the approach that all § 1983 actions would be characterized, regardless of their underlying facts, as actions for injury to the person. 731 F.2d at 651. The Tenth Circuit thus will disregard more specific periods of limitations.

The Eleventh Circuit has followed the decisions of the Fifth Circuit handed down by that court as of September 30, 1981. See *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc). Thus the Eleventh Circuit follows the Fifth Circuit's approach of characterizing civil rights claims by reference to available state statutes, drawing heavily on state law. See *McGhee v. Ogburn*, 707 F.2d 1312, 1315 (11th Cir. 1983).

The D.C. Circuit recently reviewed the disagreement among the circuits over whether state statutes governing common law torts are applicable to claims based on constitutional violations. See *McClam v. Barry*, 697 F.2d at 371-73. Although the court recognized that constitutional actions may "differ from closely analogous common-law claims in the interests they protect, in their elements and origins, and in their importance," *id.* at 373, it held that these differences are not "a ground for rejecting as not closely analogous an otherwise identical common-law cause of action." *Id.* The court concluded that limitations periods promote factfinding accuracy and settled expectations, and observed that

in determining what claim (among those for which a state limitations period is specified) is most closely analogous to a given federal claim, a court should

select the claim most closely comparable to the federal claim with respect to factfinding accuracy and settled expectations. The comparison of any two claims will generally focus on the facts that must be litigated in trying them.

Id. at 374. The court therefore applied the one-year statute governing assault and battery to the plaintiff's constitutional claim against the defendant police officers.

In addition to the confusion reviewed above, the circuits are also divided in their attitudes toward a state's recognition of a specific limitations period for actions against governmental entities. Compare *Aitchison v. Raffani*, *Morrell v. City of Picayune*, *Sacks Brothers Loan Co. v. Cunningham*, and *Green v. Ten Eyck*, 572 F.2d 1233 (8th Cir. 1978) with *Pauk v. Board of Trustees*, *Donovan v. Reinbold*, 433 F.2d 738 (9th Cir. 1970), and the decision of the court of appeals below, which rejected a statute of limitations applicable to "[a]ctions against a governmental entity or a public employee for torts." N.M. Stat. Ann. § 41-4-15 (1978).

Given the deep division of opinion among the circuits, it is clear that the question of what considerations are relevant to selecting the most analogous state action cannot be resolved without guidance from this Court. As the court of appeals stated before summarizing the conflicting decisions among the circuits,

... the Supreme Court has been singularly unhelpful in providing guidance on this important issue of federal law. The Court has instructed us to borrow "the state law of limitations governing an analogous cause of action," *Tomanio*, 446 U.S. at 483-84, to "adopt the local law of limitation," *Runyon v. McCrary*, 427 U.S. 160, 180 (1976) (quoting *Holmberg*

v. Armbrrecht, 327 U.S. 392, 395 (1946)), and to apply "the most appropriate one provided by state law." *Johnson v. Railway Express Agency*, 421 U.S. at 462. Unfortunately, however, the Court has not addressed the issues that divide the circuits: what federal considerations are relevant to characterizing a civil rights claim and to determining whether a state limitations period is analogous or appropriate.

731 F.2d at 643.

In the face of congressional refusal to enact a uniform statute of limitations for § 1983 actions and the failure to achieve any consensus among the circuit courts of appeal regarding this question, it is critical that this Court come to grips with the problem. If this important question is not addressed by this Court, the circuits will continue to issue conflicting opinions, and litigants across the country will continue to be plagued by uncertainty and inconsistency.

CONCLUSION

The decision below violates established principles of federalism and creates an irreconcilable conflict between federal and state courts in New Mexico. Moreover, the Tenth Circuit's refusal to defer to state law conflicts with the decisions of other circuits and highlights the dispute, yet unaddressed by this Court, over the application of statutes of limitation selected by state law when the state limitations period is neither too short nor inconsistent with the Constitution and laws of the United States. Finally, the decision below raises an additional question of vital importance which has not yet been addressed by this

Court, namely "what considerations are relevant to the process of characterizing a civil rights claim for the purpose of selecting the most closely analogous cause of action and its applicable statute of limitation?" For the reasons stated above, Petitioner's request for a writ of certiorari to review the decision below should be granted.

Respectfully submitted,

RODEY, DICKASON, SLOAN, AKIN &
ROBB, P.A.

By /s/ BEN M. ALLEN

By /s/ DIANE FISHER

By /s/ BRUCE HALL

Post Office Box 1888

Albuquerque, New Mexico 87103

Telephone: (505) 765-5900

Attorneys for Petitioners

App. 1

APPENDIX A

Gary GARCIA, Plaintiff-Appellee,

v.

Richard WILSON and Martin Vigil,
Defendants-Appellants.

Nos. 83-1017, 83-1018.

United States Court of Appeals,
Tenth Circuit.

March 30, 1984.

Section 1983 action was brought on basis of allegations that plaintiff's beating by state police officer was result of state police chief's gross negligence in failing to train, supervise, and discipline officer properly when he knew that officer had assaulted other county residents. Defendants moved to dismiss on ground of statute of limitations. The United States District Court for the District of New Mexico, Howard C. Bratton, Chief Judge, denied motion and certified issue for interlocutory appeal. The Court of Appeals, Seymour, Circuit Judge, held that: (1) for purposes of statute of limitations in § 1983 cases and, specifically, determining appropriate state limitations period to apply, all civil rights claims are to be generally, uniformly characterized, regardless of discrete facts involved, as actions for injury to personal rights, and (2) so characterizing the claims in the instant action, three-year New Mexico statute of limitations for actions brought for injury to the person or reputation of any person was applicable, and action was therefore timely.

Remanded.

1. Civil Rights—13.10

First step in selecting applicable state statute of limitations in federal civil rights action is to characterize essential nature of the federal action, which is matter of federal law; court must then determine which state limitations period is applicable to that characterization. 42 U.S.C.A. §§ 1983, 1988.

2. Federal Courts—424

Although federal courts are bound by the state's construction of its own statute of limitations, it is question of federal law whether particular statute, as construed by the state, is applicable to a federal claim.

3. Civil Rights—13.13(1)

To establish claim under § 1983, plaintiff must prove action under color of state law resulting in deprivation of constitutional or federal rights. 42 U.S.C.A. § 1983.

4. Civil Rights—13.1

Although § 1983 creates cause of action for violations of constitutional rights, it is solely a procedural statute which does not itself grant any substantive right. 42 U.S.C.A. § 1983.

5. Action—2

Cause of action is established by showing existence of right held by the plaintiff and breach thereof by defendant, and it is distinct from remedy sought.

6. Civil Rights—13.10

For purposes of statute of limitations in § 1983 cases and, specifically, determining appropriate state limitations

period to apply, all civil rights claims are to be generally, uniformly characterized, regardless of discrete facts involved, as actions for injury to personal rights; overruling *Clulow v. Oklahoma*, 700 F.2d 1291; *Shah v. Halliburton Co.*, 627 F.2d 1055; *Zuniga v. Amfac Foods, Inc.*, 580 F.2d 380; *Spiegel v. School District No. 1*, 600 F.2d 264; *Hansbury v. Regents of the University of California*, 596 F.2d 944. 42 U.S.C.A. § 1983.

7. Civil Rights—13.10

For purposes of determining appropriate New Mexico limitations period to apply in § 1983 action based on allegations that plaintiff's beating by state police officer was result of state police chief's gross negligence in failing to train, supervise, and discipline the officer properly when he knew that officer had assaulted other county residents, claims would be characterized pursuant to rule announced in instant decision as actions for injury to personal rights; hence, applicable New Mexico statute was that providing three-year limitations period for actions for injuries to the person or reputation of any person. 42 U.S.C.A. § 1983; NMSA 1978, § 37-1-8.

Ben M. Allen of Rodey, Dickason, Sloan, Akin & Robb, Albuquerque, N. M. (John W. Cassell, Sp. Asst. Atty. Gen., Asst. Legal Advisor, New Mexico State Police, Santa Fe, N. M., filed a brief on behalf of defendant-appellant Vigil), for defendants-appellants.

Richard Rosenstock, Chama, N. M. (Steven G. Farber, Santa Fe, N. M., with him on the brief), for plaintiff-appellee.

Thomas L. Johnson of Modrall, Sperling, Roehl, Harris & Sisk, P.A., Albuquerque, N. M., filed a brief for amicus curiae State of New Mexico.

Before SETH, Chief Judge, and HOLLOWAY, McWILLIAMS, BARRETT, DOYLE, McKAY, LOGAN and SEYMOUR, Circuit Judges.

SEYMOUR, Circuit Judge.

Gary Garcia brought these consolidated civil rights actions under 42 U.S.C. § 1983 (1976) against former New Mexico State Police Officer Richard Wilson, and State Police Chief Martin Vigil. Garcia alleged that his constitutional rights were violated when Wilson viciously beat him on his face and body with a "slapper" and then sprayed him with tear gas. Garcia further alleged that Vigil had improperly permitted Wilson to be hired as a State Police officer when Vigil knew or should have known that Wilson had previously been convicted of several serious crimes and when Vigil had been advised not to hire Wilson by two high ranking New Mexico State Police officers. Garcia also asserted that Vigil had been grossly negligent in failing to train, supervise, and discipline Wilson properly when he knew that Wilson had assaulted other county residents after he became a police officer.

Defendants moved to dismiss the action, asserting that the suit was barred by the statute of limitations. The district court denied the motion and certified the issue for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) (1976).

The only issue before us is what limitations period should be applied to this section 1983 claim. We have determined to give en banc consideration to this case in

order to harmonize our decisions in this area, resolve any inconsistencies, and establish a uniform approach to govern resolution of this question in future cases.

I.

No statute of limitations is expressly provided for civil rights claims brought under section 1983. However, Congress has specifically directed us to look to state law in civil rights cases when federal law is deficient and the state law "is not inconsistent with the Constitution and laws of the United States." See 42 U.S.C. § 1988 (1976).¹ This admonition has been interpreted to mean that "the controlling period would ordinarily be the most appropriate one provided by state law." *Board of Regents v. Tomanio*, 446 U.S. 478, 485, 100 S.Ct. 1790, 1795, 64 L.Ed.2d 440 (1980) (quoting *Johnson v. Railway Express Agency*, 421 U.S. 454, 462, 95 S.Ct. 1716, 1721, 44 L.Ed.2d 295 (1975)).

¹Section 1988 provides:

"The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title 'CIVIL RIGHTS', and of Title 'CRIMES', for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause"

42 U.S.C. § 1988 (Supp. V 1981).

[1,2] The first-step in selecting the applicable state statute of limitations is to characterize the essential nature of the federal action. *Knoll v. Springfield Township School District*, 699 F.2d 137, 140 (3d Cir. 1983); *Braden v. Texas A & M University System*, 636 F.2d 90, 92 (5th Cir. 1981); *Burns v. Sullivan*, 619 F.2d 99, 105 (1st Cir.), *cert. denied*, 449 U.S. 893, 101 S.Ct. 256, 66 L.Ed.2d 121 (1980). Characterization of such a federal claim is a matter of federal law. *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 706, 86 S.Ct. 1107, 1113, 16 L.Ed.2d 192 (1966); *Pauk v. Board of Trustees*, 654 F.2d 856, 865-66 & n. 6 (2d Cir. 1981), *cert denied*, 455 U.S. 1000, 102 S.Ct. 1631, 71 L.Ed.2d 866 (1982); *Zuniga v. Amfac Foods, Inc.*, 580 F.2d 380, 383 (10th Cir. 1978); *Williams v. Walsh*, 558 F.2d 667, 672 (2d Cir. 1977). The court must then determine which state limitations period is applicable to this characterization. *Braden*, 636 F.2d at 92; *Burns*, 619 F.2d at 105. Although the federal courts are bound by the state's construction of its own statutes of limitations, it is a question of federal law whether a particular statute, as construed by the state, is applicable to a federal claim. *Knoll*, 699 F.2d at 141-42; *Pauk*, 654 F.2d at 866 n. 6.

There is little dispute that these fundamental principles govern the choice of a limitations period for civil rights claims. However, the courts vary widely in the methods by which they characterize a section 1983 action, and in the criteria by which they evaluate the applicability of a particular state statute of limitations to a particular claim. The actual process used to select an appropriate state statute varies from circuit to circuit and sometimes from panel to panel. *See, e.g., Garcia v. University of Kansas*, 702 F.2d 849 (10th Cir. 1983); *Garmon v. Foust*, 668 F.2d 400 (8th Cir.) (en banc), *cert. denied*, 456 U.S.

998, 102 S.Ct. 2283, 73 L.Ed.2d 1294 (1982); *Beard v. Robinson*, 563 F.2d 331 (7th Cir. 1977), *cert. denied*, 438 U.S. 907, 98 S.Ct. 3125, 57 L.Ed.2d 1149 (1978).

Given the varied factual circumstances producing civil rights violations and the diversity of state limitations statutes, it is not surprising that no uniform approach to this problem has developed. Moreover, the Supreme Court has been singularly unhelpful in providing guidance on this important issue of federal law. The Court has instructed us to borrow "the state law of limitations governing an analogous cause of action," *Tomanio*, 446 U.S. at 483-84, 100 S.Ct. at 1794-95, to "'adopt the local law of limitation,'" *Runyon v. McCrary*, 427 U.S. 160, 180, 96 S.Ct. 2586, 2599, 49 L.Ed.2d 415 (1976) (quoting *Holmberg v. Armbricht*, 327 U.S. 392, 395, 66 S.Ct. 582, 90 L.Ed. 743 (1946)), and to apply "the most appropriate one provided by state law." *Johnson v. Railway Express Agency*, 421 U.S. at 462, 95 S.Ct. at 1721. Unfortunately, however, the Court has not addressed the issues that divide the circuits: what federal considerations are relevant to characterizing a civil rights claim and to determining whether a state limitations period is analogous or appropriate.

In the face of Congressional refusal to enact a uniform statute and the Supreme Court's failure to come to grips with the problem, it is imperative that we establish a consistent and uniform framework by which suitable statutes of limitations can be determined for all section 1983 claims in this circuit. In so doing, we must be mindful of the broad remedial purposes of this civil rights legislation. *See Childers v. Independent School District No. 1*, 676 F.2d 1338, 1342-43 (10th Cir. 1982). However, the Supreme Court has clearly stated that the policies of certainty and repose embodied in statutes of limitations

are not inconsistent with the purposes of section 1983 and are therefore not to be disfavored in civil rights cases. See *Tomanio*, 446 U.S. at 487-89, 100 S.Ct. at 1796-97. With these considerations in mind, we begin our analysis by examining the approaches adopted by other circuits.

A. First Circuit

The First Circuit has characterized a section 1983 claim alleging the unconstitutional termination of public employment as sounding in tort, and has applied the Puerto Rican statute governing general tort suits to such a claim. See *Ramirez de Arellano v. Alvarez de Choudens*, 575 F.2d 315 (1st Cir. 1978); *Graffels Gonzalez v. Garcia Santiago*, 550 F.2d 687 (1st Cir. 1977). However, in a subsequent case in Massachusetts, the court disregarded this characterization and chose instead to apply a state statute giving public employees six months to file an unlawful employment action in state court. The court stated that the statute was "specifically tailored to deal with the plaintiff's cause of action." *Burns v. Sullivan*, 619 F.2d 99, 106 (1st Cir.), cert. denied, 449 U.S. 893, 101 S.Ct. 256, 66 L.Ed.2d 121 (1980); see also *Holden v. Commission Against Discrimination*, 671 F.2d 30 (1st Cir.), cert. denied, — U.S. —, 103 S.Ct. 97, 74 L.Ed.2d 88 (1982).²

²The court in *Burns* reasoned that failure to apply the six-month limitations period governing discrimination claims filed under state law would allow plaintiffs to bypass the state administrative proceedings and bring their claim in federal court. 619 F.2d at 107. Subsequent to the *Burns* decision, the Supreme Court clearly stated that this rationale is not relevant to determining limitations periods for the separate and independent remedies provided by sections 1981 and 1983. See *Board of*

(Continued on following page)

In a recent case involving professional disciplinary proceedings in Maine, the First Circuit analogized plaintiff's section 1983 claim to various specific common law torts based on the underlying facts and the relief sought. See *Gashgai v. Leibowitz*, 703 F.2d 10 (1st Cir. 1983) (alleged state deprivation of reputation and ability to practice medicine most analogous to defamation and "false light" invasion of privacy). The court adopted this approach without discussion, notwithstanding its arguable inconsistency with earlier cases. Thus, in *Walden, III, Inc. v. Rhode Island*, 576 F.2d 945, 947 (1st Cir. 1978), the court refused to analogize the plaintiff's claim to a specific tort, remarking:

"While for purposes of deciding this case we need not rule finally on the appropriateness of ever referring to more than one statute of limitations should a precisely analogous state claim indisputably have a different limitations period, it is obviously preferable that one statute of limitations, such as that provided for torts, apply generally to most if not all § 1983 actions arising in a particular jurisdiction."

Id. at 947 (emphasis added).

B. Second Circuit

The Second Circuit recently affirmed its earlier decisions characterizing all section 1983 claims as actions on a

(Continued from previous page)

Regents v. Tomanio, 466 U.S. 478, 489-91, 100 S.Ct. 1790, 1797-98, 64 L.Ed.2d 440 (1980). The First Circuit has nonetheless continued to follow the *Burns* analysis. See *Holden v. Commission Against Discrimination*, 671 F.2d 30, 33 & n. 3 (1st Cir.), cert. denied, — U.S. —, 103 S.Ct. 97, 74 L.Ed.2d 88 (1982); *Hussey v. Sullivan*, 651 F.2d 74, 75-76 (1st Cir. 1981). To the extent that these cases are based on the ground rejected in *Tomanio*, they are unpersuasive.

liability created by statute. *Pauk v. Board of Trustees*, 654 F.2d 856, 866 (2d Cir. 1981), *cert. denied*, 455 U.S. 1000, 102 S.Ct. 1631, 71 L.Ed.2d 866 (1982). The court refused to find section 1983 claims analogous to common law torts, stating that "[w]hile some § 1983 claims have counterparts in actions at common law, the constitutional tort remedied by § 1983 is 'significantly different from' state torts" *Id.* (quoting *Monroe v. Pape*, 365 U.S. 167, 196, 81 S.Ct. 473, 488, 5 L.Ed.2d 492 (1961) (Harlan, J., concurring)). The court also rejected application of state statutes governing suits to recover for the tortious conduct of public employees, concluding that "[i]t would be anomalous for a federal court to apply a state policy restricting remedies against public officials to a federal statute that is designed to augment remedies against those officials, especially a federal statute that affords remedies for the protection of constitutional rights." *Id.* 654 F.2d at 862. The court pointed out that applying statutes governing actions on liability created by statute to all section 1983 claims provides uniformity in approach and is consistent with the broad remedial purposes of the civil rights acts. *Id.* at 866.

C. Third Circuit

The Third Circuit applies "the limitation . . . which would be applicable in the courts of the state in which the federal court is sitting had an action seeking similar relief been brought under state law." *Polite v. Diehl*, 507 F.2d 119, 122 (3d Cir. 1974) (en banc) (applying Pennsylvania one-year statute to § 1983 claims analogous to false arrest, and two-year wrongful injury statute to claims analogous to assault and battery and coercion of guilty plea); see also *Meyers v. Pennypack Woods Home Ownership Asso-*

ciation, 559 F.2d 894, 900 (3d Cir. 1977). The court examiner "[t]he essential nature of the federal claim, including the relief sought and the type of injury alleged . . . 'within the scheme created by the various state statutes of limitations.'" *Aitchison v. Raffiani*, 708 F.2d 96, 101 (3d Cir. 1983) (quoting *Davis v. United States Steel Supply*, 581 F.2d 335, 337 (3d Cir. 1978) (applying New Jersey Tort Claim Act two-year limitations).) Thus the Third Circuit defines the federal cause of action in terms of factually similar state actions as set out in various state limitations schemes.

D. Fourth Circuit

In characterizing the nature of a section 1983 cause of action, the Fourth Circuit has stated that

"[i]n essence, § 1983 creates a cause of action where there has been injury, under color of state law, to the person or to the constitutional or federal statutory rights which emanate from or are guaranteed to the person. In the broad sense, every cause of action under § 1983 which is well-founded results from 'personal injuries.'"

Almond v. Kent, 459 F.2d 200, 204 (4th Cir. 1972). Accordingly, the court in *Almond* applied the Virginia statute governing personal injuries to the plaintiff's claim against the sheriff and state police "not because there was a right of recovery at common law but because there was a violation of a constitutional right not to be beaten." *Id.* at 203-04. Citing *Monroe v. Pape*, 365 U.S. at 196, 81 S.Ct. at 488, the court held the alleged constitutional violation to be "more important than those transitory torts for which a one-year period is prescribed." *Id.* 459 F.2d at 204.

The court subsequently applied a West Virginia two-year personal injury statute rather than a five-year contract statute to a high school principle's allegation under sections 1981 and 1983 that his discharge was unconstitutional. *McCausland v. Mason County Board of Education*, 649 F.2d 278 (4th Cir.), *cert. denied*, 454 U.S. 1098, 102 S.Ct. 671, 70 L.Ed.2d 639 (1981). The court pointed out that "to demonstrate the required constitutional basis for his federal complaint he must allege personal injury transcending contract rights." *Id.* at 279. The court also relied on the *Almond* analysis in rejecting a state statute expressly applicable to section 1983 actions. *See Johnson v. Davis*, 582 F.2d 1316, 1319 (4th Cir. 1978). Noting that the Virginia statute limiting section 1983 actions was shorter than that applicable to personal injuries, the court concluded that the special limitations period undervalued the constitutional values at stake, and unreasonably discriminated against the "constitutional tort remedy." *Id.*

Notwithstanding the Fourth Circuit's otherwise consistent characterization of section 1983 as creating a cause of action for injury to personal rights, the court applies the state limitations for liability created by statute to all section 1983 claims arising in North Carolina. *See Cole v. Cole*, 633 F.2d 1083, 1092 (4th Cir. 1980) (constitutional claims arising out of false arrest and abuse of process); *Bireline v. Seagondollar*, 567 F.2d 260, 263 (4th Cir. 1977) (allegedly discriminatory employment termination of state university instructor), *cert. denied*, 444 U.S. 842, 100 S.Ct. 83, 62 L.Ed.2d 54 (1979).

E. Fifth Circuit

Two lines of cases have developed in the Fifth Circuit using different methods for selecting the most analogous

state limitations period. *See Shaw v. McCorkle*, 537 F.2d 1289, 1292 (5th Cir. 1976). One method uses the generally accepted two-step process in which the court first characterizes the essential nature of the federal claim and then determines, according to state law, which state period would apply to a state claim similar to the federal characterization. *Id.* "A second line of cases formulates a more direct method of selection, asking simply which state limitations period the state itself would have enforced had plaintiff brought an action seeking similar relief in a court of that state." *Id.* The court in *Shaw* concluded that these approaches are not inconsistent because they "in fact depend substantially on state law in categorizing the essential nature of the claim presented" *Id.* at 1293. In keeping with this conclusion, the court has characterized section 1983 claims by reference to similar state law actions. *See Morrell v. City of Picayne*, 690 F.2d 469 (5th Cir. 1982) (assault by police officer not governed by Mississippi one-year statute because under Mississippi law such is not mere assault and battery but, breach of sheriff's official duty); *Lavelle v. Listi*, 611 F.2d 1129 (5th Cir. 1980) (Louisiana one-year assault statute of limitations applied in § 1983 action).

Although noting its holding in *Shaw* that federal courts draw heavily on state law in categorizing civil rights claims, the court nevertheless concluded in an employment termination case that all section 1983 causes of action are essentially tortious in nature. *Braden v. Texas A & M University System*, 636 F.2d 90, 92 (5th Cir. 1981). The plaintiff in *Braden* alleged that his discharge deprived him of liberty and property interests without due process. The court refused to analogize this claim to a state law action arising out of an employment contract, concluding

that "[l]iability is imposed for subjecting a person to the deprivation of rights secured by the Constitution and laws of the United States, not for breach of contract." *Id.* Accordingly, the court applied state limitations periods governing tort actions for injury to the person of another and actions for trespass to or conversion of property.

Although the circuit subsequently employed the analysis set out in *Braden*, see *Jones v. Orleans Parish School Board*, 688 F.2d 342 (5th Cir.) (employment termination claim under §§ 1981, 1983 held tortious in Louisiana), *cert. denied*, — U.S. —, 103 S.Ct. 2420, 77 L.Ed.2d 1310 (1982); *Moore v. El Paso County*, 660 F.2d 586 (5th Cir. 1981) (same in Texas), *cert. denied*, — U.S. —, 103 S.Ct. 51, 74 L.Ed.2d 57 (1982); *Rubin v. O'Koren*, 644 F.2d 1023 (5th Cir. 1981) (same in Alabama), is nonetheless applied a state statute governing unwritten employment contracts to a section 1981 claim in *White v. United Parcel Service*, 692 F.2d 1 (5th Cir. 1982) (Mississippi). Unconstitutional employment termination is thus viewed as tortious in Texas, Alabama, and Louisiana, and contractual in Mississippi.

F. Sixth Circuit

The Sixth Circuit's approach to characterizing civil rights claims has varied according to available state statutes of limitations. In an employment discrimination suit in Michigan, the court stated that the essence of a section 1983 action is "a claim to recover damages for injury wrongfully done to the person." *Madison v. Wood*, 410 F.2d 564, 567 (6th Cir. 1969). The court said that "[t]he Fourteenth Amendment protects the most fundamental personal rights and liberties guaranteed to any citizen of the United States. When one is deprived of his civil rights,

it is clear that the injury is to his person" *Id.* (quoting *Krum v. Sheppard*, 255 F.Supp. 994, 997 (W.D.Mich. 1966)).

In subsequent employment discrimination suits, however, the court has applied state statutes governing a liability created by statute. See *Mason v. Owens-Illinois, Inc.*, 517 F.2d 520 (6th Cir. 1975) (Ohio); *Garner v. Stephens*, 460 F.2d 1144 (6th Cir. 1972) (Kentucky). The court justified this result in *Garner* by pointing out that the state court had limited application of the personal injury limitations statute to claims involving physical injuries. *Id.* at 1146-47. Elsewhere the court has expressly refused to characterize section 1983 suits based on false arrest and malicious prosecution as actions on a liability created by statute, and has applied instead the limitations governing factually similar common law torts. See *Kilgore v. City of Mansfield*, 679 F.2d 632, 634 (6th Cir. 1982) (Ohio); *Carmicle v. Weddle*, 555 F.2d 554, 555 (6th Cir. 1977) (Kentucky).

G. Seventh Circuit

Resolving a split on the issue, the Seventh Circuit held that a limitations period for section 1983 actions should not be selected by analogizing the facts underlying the claim to traditional common law torts. *Beard v. Robinson*, 563 F.2d 331, 336-37 (7th Cir. 1977), *cert. denied*, 438 U.S. 907, 98 S.Ct. 3125, 57 L.Ed.2d 1149 (1978). In *Beard* the court applied the Illinois limitations statute applicable to statutory causes of action, stating:

"By following the *Wakat* [*v. Harlib*, 253 F.2d 59 (7th Cir. 1958),] approach of applying a uniform statute of limitations, we avoid the often strained

process of characterizing civil rights claims as common law torts, and the

'[i]nconsistency and confusion [that] would result if the single cause of action created by Congress were fragmented in accordance with analogies drawn to rights created by state law and the several different periods of limitation applicable to each state-created right were applied to the single federal cause of action.' *Smith v. Cremins*, [308 F.2d 187] at 190 [(9th Cir. 1962)]."

Id. at 337.

Although the court indicated that one limitations period should uniformly be applied to all civil rights claims, the court has found it impossible to do so given the differing statutes of limitations in other states. *See, e.g., Movement for Opportunity & Equality v. General Motors Corp.*, 622 F.2d 1235, 1242-43 (7th Cir. 1980) (Indiana two-year personal injury statute applied to § 1981 claim); *Sacks Brothers Loan Co. v. Cunningham*, 578 F.2d 172, 176 (7th Cir. 1978) (Indiana five-year statute governing actions against a public officer applied to § 1983 action against tax assessor).

H. Eighth Circuit

The Eighth Circuit also developed two inconsistent lines of cases. One line analogized civil rights cases to similar common law torts. *See, e.g., Johnson v. Dailey*, 479 F.2d 86 (8th Cir. 1973) (Iowa two-year personal injury statute applied to § 1983 claim analogous to malicious prosecution action), *cert. denied*, 414 U.S. 1009, 94 S.Ct. 371, 38 L.Ed.2d 246 (1973). The other line held that such an analogy is improper because a civil rights claim is fundamentally different from a common law tort. *See, e.g., Lamb v. Amalgamated Labor Life Insurance Co.*, 602 F.2d

155 (8th Cir. 1979) (Missouri five-year statute governing liability created by statute applied to § 1983 claim alleging conspiracy to deprive plaintiff of constitutional rights); *Glasscoe v. Howell*, 431 F.2d 863 (8th Cir. 1970) (Arkansas three-year statute governing liability created by statute, or five-year general statute applies to a § 1983 action against police, rather than one-year statute for assault and battery or false imprisonment).

The court addressed this inconsistency in *Garmon v. Foust*, 668 F.2d 400 (8th Cir. 1982) (*en banc*), *cert. denied*, 456 U.S. 998, 102 S.Ct. 2283, 73 L.Ed.2d 1294 (1982), and rejected

"the tort analogy because it unduly cramps the significance of section 1983 as a broad, statutory remedy. Section 1983 provides a cause of action for deprivation of civil rights that in no way depends upon state common law. A litigant may pursue a section 1983 action rather than, or in addition to, state remedies."

Id. at 406. The court based its determination on its conclusion that "a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right." *Id.* (quoting *Monroe v. Pape*, 365 U.S. at 196, 81 S.Ct. at 488 (Harlan, J., concurring)).

I. Ninth Circuit

The Ninth Circuit, in an often quoted opinion, also has concluded that common law tort analogies are not appropriate because the elements of a common law tort are not the same as the elements establishing a cause of action

under section 1983. See *Smith v. Cremins*, 308 F.2d 187, 190 (9th Cir. 1962) (California). In keeping with this conclusion, the Ninth Circuit almost consistently has characterized claims under sections 1981 and 1983 as actions on a liability created by statute. See, e.g., *Plummer v. Western International Hotels Co.*, 656 F.2d 502, 506 (9th Cir. 1981) (Oregon, § 1981); *Bratton v. Bethlehem Steel Corp.*, 649 F.2d 658, 663 (9th Cir. 1980) (California, § 1981); *Clark v. Musick*, 623 F.2d 89, 92 (9th Cir. 1980) (Oregon, § 1983). *Tyler v. Reynolds Metals Co.*, 600 F.2d 232, 234 (9th Cir. 1979) (Arizona, § 1981).

The one exception to the Ninth Circuit's uniform approach is *Kosikowski v. Bourne*, 659 F.2d 105 (9th Cir. 1981), in which the court adopted a state limitations period expressly applicable to section 1983 claims brought in state court. The court stated that

"[t]his precise expression of the intent of the Oregon Legislature makes unnecessary a resort to a characterization of appellants' cause of action in the manner employed by this court in *Clark v. Musick*, 623 F.2d 89 (9th Cir. 1980). Such characterization serves no purpose other than to provide guidance in the selection of the applicable state statute. When the state has expressly made that selection the federal courts should accept it unless to do so would frustrate the purposes served by the federal law upon which the plaintiff's claims rest."

Id. at 107.

J. Eleventh Circuit

The Eleventh Circuit has adopted as precedent the decisions of the Fifth Circuit handed down by that court as of September 30, 1981. See *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc). Thus the

Eleventh Circuit follows the Fifth Circuit's approach of characterizing civil rights claims by reference to available state statutes, drawing heavily on state law. See *McGhee v. Ogburn*, 707 F.2d 1312, 1315 (11th Cir. 1983).

K. D.C. Circuit

The D.C. Circuit recently addressed the disagreement among the circuits over whether state statutes governing common law torts are applicable to claims based on constitutional violations. See *McClam v. Barry*, 697 F.2d 366, 371-73 (D.C. Cir. 1983). The court recognized that constitutional actions may "differ from closely analogous common-law claims in the interests they protect, in their elements and origins, and in their importance." *Id.* at 373. However, it held that these differences are not "a ground for rejecting as not closely analogous an otherwise identical common-law cause of action." *Id.* The court concluded that limitations periods promote factfinding accuracy and settled expectations, and observed that

"in determining what claim (among those for which a state limitations period is specified) is most closely analogous to a given federal claim, a court should select the claim most closely comparable to the federal claim with respect to factfinding accuracy and settled expectations. *The comparison of any two claims will generally focus on the facts that must be litigated in trying them.*"

Id. at 374 (emphasis added). It then applied the one year statute governing assault and battery to the plaintiff's constitutional claim against the defendant police officers.

The court's decision in *McClam* is based on its assumption that the facts establishing the elements peculiar to the constitutional cause of action are simple to prove.

Id. at 374 n. 7. The *McClam* court therefore reasoned that these elements do not render the constitutional claim so different from the comparable state cause of action that the particular state statute of limitations is inappropriate for a section 1983 action.

II.

The fundamental point of disagreement in selecting a statute of limitations for civil rights actions is whether such claims should be characterized in terms of the specific facts generating a particular suit, or whether a more general characterization of such claims should be applied regardless of the discrete facts involved. Our past practice usually has been to characterize the section 1983 claim according to its underlying specific facts. *See, e.g., Clulow v. Oklahoma*, 700 F.2d 1291, 1299 (10th Cir. 1983); *Shah v. Halliburton Co.*, 627 F.2d 1055, 1059 (10th Cir. 1980); *Zuniga v. Amfac Foods, Inc.*, 580 F.2d 380, 383-87 (10th Cir. 1978). However, we have also variously characterized a section 1983 action alleging wrongful discharge or refusal to hire as a liability created by statute, *Spiegel v. School District No. 1*, 600 F.2d 264, 265-66 (10th Cir. 1979), as contractual in nature, *Hansbury v. Regents of the University of California*, 596 F.2d 944, 949 n. 15 (10th Cir. 1979), and as a noncontractual injury to the rights of another, *Garcia v. University of Kansas*, 702 F.2d 849, 850-51 (10th Cir. 1983). As more fully explained below, we decide today to adopt a general characterization for all civil rights claims based on our perception of the nature of such claims, and our conviction that this approach will ultimately best effectuate the purposes of both the civil rights acts and statutes of limitations.

We cannot accept the analysis used by the D.C. Circuit in *McClam* to support comparing civil rights actions to factually similar state court suits. *McClam* rests on two assumptions that the D.C. Circuit took to be true in the majority of cases. The court assumed first that the facts required to establish the elements of a federal claim are easy to prove, and that the federal claim therefore is not sufficiently distinct from a comparable state cause of action to warrant the application of a different statute of limitations. The court further assumed that state statutes of limitations are concerned primarily with factfinding certainty and settled expectations. While both of these assumptions may sometimes be true, they are not true sufficiently often to justify adopting an approach that itself creates substantial problems.

[3] To establish a claim under section 1983, a plaintiff must prove action under color of state law resulting in the deprivation of constitutional or federal rights. The court in *McClam* believed that whether a defendant acted in an official capacity is usually a simple factual matter. *Id.* 697 F.2d at 374 n. 7. Even accepting this generalization as valid, *but cf. Gilmore v. Salt Lake Community Action Program*, 710 F.2d 632, 635-39 (10th Cir. 1983), the facts establishing a constitutional or statutory deprivation frequently are complex and peculiarly within the knowledge of the defendant. *See, e.g., Miller v. City of Mission*, 705 F.2d 368 (10th Cir. 1983); *Clulow v. Oklahoma*, 700 F.2d 1291; *Key v. Rutherford*, 645 F.2d 880 (10th Cir. 1981). The plaintiff need not prove such facts to recover in a state law action. We conclude that the evidence necessary to support a section 1983 claim is so often significantly distinct from the facts at issue in an arguably analogous

state cause of action that the differences cannot be dismissed as unimportant. Accordingly, a state's determination that a state claim should be governed by a particular limitations period to ensure accuracy in the factfinding process is not necessarily applicable to a federal claim arising out of the same incident but resting on different elements involving proof of different facts.

While we agree with the court's premise in *McClam* that the state's judgment in setting limitations periods is typically concerned with factfinding accuracy and settled expectations, those purposes are not the only ones motivating the enactment of such statutes. Limitations periods specifically applicable to suits against state and local officials may well be motivated by a legislative desire to limit the liability of the public entity employer in conjunction with a waiver of sovereign immunity. As the Second and Fourth Circuits have pointed out, borrowing such limitations periods is not consistent with the remedial purpose of section 1983. See *Pauk v. Board of Trustees*, 654 F.2d at 862; *Johnson v. Davis*, 582 F.2d at 1319. Thus, unlike the Ninth Circuit in *Kosikowski v. Bourne*, 659 F.2d at 107, we are unwilling to hold that a state's articulation of the limitations period specifically applicable to section 1983 claims is determinative of the federal issue and relieves the federal courts from characterizing a civil rights claim as a matter of federal law.

Attempting to compare civil rights claims with particular state law actions creates other problems that are clearly revealed by our own experience and by our examination of the results of this approach in other circuits. Virtually any section 1983 claim is arguably analogous to more than one state cause of action. See, e.g., *Clulow*,

700 F.2d at 1299-1300; *Shah*, 627 F.2d at 1057-59. Thus, attempting to determine which state claim is most nearly comparable is an uncertain task with no definitive answer. In the First Circuit, for example, a section 1983 cause of action founded on employment discrimination is tortious in Puerto Rico, see *Ramirez de Arellano v. Alvarez de Choudens*, 575 F.2d at 318-19, but does not sound in tort in Massachusetts simply because the state limitations scheme is different there, see *Burns v. Sullivan*, 619 F.2d at 105-07. The Fifth Circuit has characterized unconstitutional employment discrimination both as a tortious injury to the rights of another, see *Braden v. Texas A & M University System*, 636 F.2d at 93, and as an action on an unwritten contract, see *White v. United Parcel Service*, 692 F.2d at 2-3. As noted above, we have characterized a section 1983 employment discrimination claim three different ways in this circuit in *Spiegel*, *Hansbury* and *Garcia*. This anomaly is the predictable outcome of characterizing the federal claim by deferring to the state court's treatment of a state claim seeking similar relief. Variations in state law and factual distinctions often become dispositive even though they are irrelevant to the elements of the constitutional cause of action.

The resulting uncertainty encourages both parties to argue the state factual analogy favorable to their respective positions at every stage of the proceedings with a justifiable hope of success. Consequently, describing the federal cause of action in terms of state law claims does not promote settled expectations and repose, but instead encourages voluminous litigation that is collateral to the merits and consumes scarce judicial resources. Moreover, as pointed out above, this approach results in the unequal

treatment of similar claims. Such uneven application may cause the losing party to infer that the choice of a limitations period in his case was result oriented, thereby undermining his belief that he has been dealt with fairly. This objectionable possibility is particularly undesirable in the context of socially sensitive civil rights litigation. In sum, we conclude that the arguments in favor of this approach are not persuasive in view of its disadvantages. All of the federal values at issue in selecting a limitations period for section 1983 claims are best served by articulating one uniform characterization describing the essential nature underlying all such claims.

[4] Those courts adopting this latter approach have characterized the fundamental nature of civil rights claims as either actions on a liability created by statute, or actions for injury to the rights of another. *Compare, e.g., Pauk v. Board of Trustees*, 654 F.2d at 866, with *Almond v. Kent*, 459 F.2d at 203-04. Although section 1983 creates a cause of action for violations of constitutional rights, it is solely a procedural statute which does not itself grant any substantive rights. *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 617-18, 99 S.Ct. 1905, 1915-16, 60 L.Ed.2d 508 (1979). "[O]ne cannot go into court and claim a 'violation of § 1983'—for § 1983 by itself does not protect anyone against anything." *Id.*, 441 U.S. at 617, 99 S.Ct. at 1915. The remedy provided by section 1983 is statutory in origin, but the underlying liability it enforces stems primarily from the Constitution. It is thus analytically inaccurate to characterize section 1983 as a

liability created by statute³ *But cf. Pauk v. Board of Trustees*, 654 F.2d at 861-66. We believe the appropriate focus should not be on the remedy but on the elements of the cause of action, because they most fully describe the essence of the claim.

[5, 6] A cause of action is established by showing the existence of a right held by the plaintiff and a breach of that right by the defendant, and is distinct from the remedy sought. *Williams v. Walsh*, 558 F.2d 667, 670-71 (2d Cir. 1977). The elements of a section 1983 claim are the deprivation of rights secured by the Constitution or federal law, and action occurring under color of state law. These rights have been described as inhering "in man as a rational being, that is, rights to which one is entitled by reason of being a person in the eyes of the law." *Walden, III, Inc. v. Rhode Island*, 576 F.2d 945, 946 (1st Cir. 1978) (quoting *Commerce Oil Refining Corp. v. Miner*, 98 R.I. 14, 199 A.2d 606 (1964)). "In the broad sense, every cause of action under § 1983 which is well-founded results from 'personal injuries.'" *Almond v. Kent*, 459 F.2d at 204. "[T]he cause of action is in essence delictual." *Braden v. Texas A & M University System*, 636 F.2d at 92. We agree with these views. Accordingly, we conclude that every section 1983 claim is in essence an action for injury to personal rights. Henceforth, all section 1983 claims in this circuit will be uniformly so characterized for statute

³We note moreover that not every state has a statute of limitations applicable to a liability created by statute. Where no such statute exists, a court may be forced to fall back on the very process of case-by-case characterization and analogizing that we have rejected today. See, e.g., *Movement for Opportunity & Equality v. General Motors Corp.*, 622 F.2d at 1242-43, and the text *supra* at 646-647.

of limitations purposes.⁴ To the extent that our prior decisions are inconsistent with the analysis we adopt today, they are hereby overruled.

III.

[7] The incident giving rise to the cause of action before us allegedly took place on April 27, 1979. Garcia filed suit on January 28, 1982, approximately two years and nine months later. Defendants contended below that the action is governed by the two-year limitations period contained in the New Mexico Tort Claims Act, N.M.Stat. Ann. § 41-4-15(A)(1978), and that Garcia's suit therefore was not timely filed. In a thorough and thoughtful opin-

⁴The Supreme Court has addressed the issue of uniformity as a goal in determining the proper statute of limitations in civil rights cases by stating that "in the areas to which § 1988 is applicable Congress has provided direction, indicating that state law will often provide the content of the federal remedial rule. This statutory reliance on state law obviously means that there will not be nationwide uniformity on these issues." *Board of Regents v. Tomanio*, 446 U.S. at 489, 100 S.Ct. at 1797 (quoting *Robertson v. Wegmann*, 436 U.S. 584, 594 n. 11, 98 S.Ct. 1991, 1997 n. 11, 56 L.Ed.2d 554 (1978)) (emphasis added). We do not read this statement as contrary to our determination that uniformity in the characterization of federal civil rights claims is a commendable goal. Uniformity of characterization will not result in one limitations period being applied to all civil rights cases regardless of the state in which they arose. Rather, the limitations statutes in each state will be reviewed to determine which particular state statute is most applicable to actions for injuries to personal rights. The resulting period of limitations will thus vary from state to state, depending on state law. Within each state, however, the most appropriate statute of limitations will be applied to all § 1983 claims brought within that state. Other circuits have agreed with us that the interest in attaining this limited uniformity is an important one. See *Pauk v. Board of Trustees*, 654 F.2d 856, 862 (2d Cir. 1981); *Walden, III, Inc. v. Rhode Island*, 576 F.2d 945, 947 (1st Cir. 1978); *Beard v. Robinson*, 563 F.2d 331, 337 (7th Cir. 1977); *Smith v. Cremins*, 308 F.2d 187, 190 (9th Cir. 1962).

ion, the district court concluded that section 1983 claims should be uniformly characterized as actions based on a statute. Because there is no New Mexico statute governing actions on a liability created by statute, the court applied the four-year residual limitations period found in N.M.Stat. Ann. § 37-1-4 (1978).

In keeping with our holding in Part II that section 1983 claims are in essence actions to recover for injury to personal rights, we conclude that the appropriate limitations period is that found in N.M.Stat. Ann. § 37-1-8 (1978), which provides that "[a]ctions must be brought . . . for an injury to the person or reputation of any person, within three years."⁵ Accordingly, Garcia's suit was timely filed.

The case is remanded for further proceedings consistent with this opinion.

• • •

⁵In reaching this conclusion, we note the New Mexico Supreme Court's holding in *DeVargas v. New Mexico*, 97 N.M. 563, 642 P.2d 166 (1982), that the limitations period provided in the New Mexico Tort Claims Act governs § 1983 suits filed against state police officers in state court. Although state courts have concurrent jurisdiction with us over § 1983 actions, see *Martinez v. California*, 444 U.S. 277, 283 n. 7, 100 S.Ct. 553, 558 n. 7, 62 L.Ed.2d 481 (1980), the characterization of a § 1983 claim for statute of limitations purposes is nonetheless a question of federal law, as we have noted supra at 643. Because the conclusion reached in *DeVargas* is at variance with our analysis in this case, we do not adopt it.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CIV NO. 82-092 HB

GARY GARCIA,

Plaintiff,

vs.

RICHARD WILSON, individually,
and MARTIN VIGIL, individually,

*Defendants.***MEMORANDUM OPINION**

(Filed July 21, 1982)

This matter comes before the Court on defendants' motion to dismiss plaintiff's action for failure to state a cause of action upon which relief can be granted. F.R.Civ. P.12(b)(6). As grounds therefor, defendants claim that plaintiff's action is barred as untimely filed by the applicable statute of limitations.¹

The plaintiff, Gary Garcia, brings this action under 42 U.S.C. § 1983 against Richard Wilson, former New Mexico State Police Officer, and Martin Vigil, Chief of the New Mexico State Police, in their individual capacities. He seeks money damages to compensate him for the alleged deprivation of his civil rights guaranteed by the Fourth, Fifth and Fourteenth Amendments to the United

¹Should the Court deny defendants' motion to dismiss based on the statute of limitations, defendants alternatively move the Court to enter an Order certifying an immediate interlocutory appeal on this issue to the United States Court of Appeals for the Tenth Circuit, pursuant to 28 U.S.C. § 1292(b).

States Constitution, and for the personal injuries he allegedly suffered as a result of the acts and omissions of the defendants acting under color of state law. Specifically, plaintiff alleges that he was unlawfully and severely beaten and sprayed with tear gas by defendant Wilson. He also alleges that defendant Vigil improperly allowed defendant Wilson to be hired as a New Mexico State Police Officer and thereafter failed to properly and adequately discipline, train and control Wilson, thereby directly causing the injuries and violations of civil rights suffered by plaintiff.

The incident in question allegedly took place on April 27, 1979. This lawsuit was filed on January 28, 1982, more than two years later. If, as defendants urge, the two year statute of limitations contained in the New Mexico Tort Claims Act, N.M.Stat. Ann. § 41-4-15(A)(1978), governs this cause of action, plaintiff's action is barred as untimely filed.

In addition to the two year statute of limitations being urged on the Court by defendants, there are two other statutes of limitations available under New Mexico law which might also be applied to a § 1983 action. N.M.Stat. Ann. § 37-1-8 (1978) provides a three year statute of limitations for actions for an injury to a person or the reputation of any person; N.M.Stat. Ann. § 37-1-4 provides a four year statute of limitations for actions founded upon accounts, unwritten contracts, injuries to property, conversion of personal property, fraud and all other actions not otherwise provided for. Applications of either of those statutes of limitations would allow plaintiff's suit to continue.

The problem of choosing from among three possible New Mexico statutes of limitations arises because the Civil Rights Act of 1871, codified in 42 U.S.C. § 1983, does not contain its own statute of limitations. The Court must therefore adopt the most appropriate statute of limitations governing an analogous state cause of action. *Board of Regents v. Tomanio*, 446 U.S. 478, 483-84 (1980); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 462 (1975);² *Spiegel v. School District No. 1, Laramie County*, 600 F.2d 264, 265 (10th Cir. 1979). The Civil Rights Act specifically provides for this borrowing procedure³ and the Su-

²In *Johnson*, the Supreme Court stated:

Although any statute of limitations is necessarily arbitrary, the length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones In borrowing a state period of limitation for application to a federal cause of action, a federal court is relying on the State's wisdom in setting a limit, and exceptions thereto, on the prosecution of a closely analogous claim. (emphasis added).

421 U.S. at 463-64.

³42 U.S.C. § 1988 provides:

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent

(Continued on following page)

preme Court has mandated its use. *E.g.*, *Robertson v. Wegmann*, 436 U.S. 584 (1978).

Characterizing § 1983 actions is a matter of federal law. *Clark v. Musick*, 623 F.2d 89 (9th Cir. 1980) (*per curiam*); *Donovan v. Reinbold*, 433 F.2d 738 (9th Cir. 1970); *Johnnie K. v. County of Curry*, No. 81-914-M (D. N.M. April 15, 1982). See also *Auto Workers v. Hoosier Corp.*, 383 U.S. 696, 706 (1966). Once the § 1983 claim has been characterized, the statute of limitations of the most closely analogous state cause of action will be applied to the § 1983 action unless application thereof would be inconsistent with either "the Constitution and laws of the United States," *Board of Regents v. Tomanio*, 446 U.S. at 485, or "the federal policy underlying the cause of action under consideration." *Johnson v. Railway Express Agency, Inc.*, 421 U.S. at 465; *Spiegel*, 600 F.2d at 265-66. See also *Occidental Life Insurance Co. v. EEOC*, 432 U.S. 355, 367 (1977).

There are no clear guidelines from the Supreme Court indicating what factors federal courts should consider in characterizing § 1983 actions. Some courts have focused on the underlying conduct of the defendant in the § 1983

(Continued from previous page)

with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

claim and have attempted to draw analogies to state causes of action based on that conduct. Other courts have focused on the underlying statutory nature of the § 1983 action.

No uniform method of characterization has emerged, due in large part to the fact that state statutory schemes vary widely. Circuit courts attempting to characterize § 1983 actions arising in different states within a particular circuit have selected different limitation periods depending on each state's law. Compare *Major v. Arizona State Prison*, 642 F.2d 311 (9th Cir. 1981) with *Clark v. Musick*, 623 F.2d 89 (9th Cir. 1980) (*per curiam*). Adding to the confusion is the fact that, on occasion, circuit courts have reached inconsistent results as to the applicable statute of limitations to be applied to § 1983 actions arising in a single state. *E.g.*, *Beard v. Robinson*, 563 F.2d 331, 336 (7th Cir. 1977), *cert. denied sub nom Mitchell v. Beard*, 438 U.S. 907 (1978); *Garmon v. Foust*, 668 F.2d 400, 403 (8th Cir.), *cert. denied*, — U.S. — (1982).

The Tenth Circuit has addressed the question only occasionally,⁴ and has never analyzed the issue in depth in the context of the statutory scheme which exists in New

⁴There are few decisions from the Tenth Circuit concerning this issue, and most of those involve § 1983 actions arising in states other than New Mexico. *E.g.*, *Childers v. Independent School District No. 1 of Bryan County*, 676 F.2d 1338 (10th Cir. 1982) [Oklahoma]; *Brown v. Bigger*, 622 F.2d 1025 (10th Cir. 1980) (*per curiam*) [Kansas]; *Spiegel v. School District No. 1, Laramie County*, 600 F.2d 264 (10th Cir. 1979) [Wyoming]; *Brogan v. Wiggins School District*, 588 F.2d 409 (10th Cir. 1978) [Colorado]. See also *Shah v. Halliburton Co.*, 627 F.2d 1055 (10th Cir. 1980) [Oklahoma] and *Zuniga v. AMFAC Foods, Inc.*, 580 F.2d 380 (10th Cir. 1978) [Colorado] which discuss the statute of limitations to be applied in 42 U.S.C. § 1981 cases.

Mexico.⁵ In the absence of clear guidelines or precedent, the United States District Court judges in the District of New Mexico have, in the past, rejected the two year statute of limitations contained in the New Mexico Tort Claims Act, N.M.Stat. Ann. §§ 41-4-1 *et seq.* (1978), and applied either the four year statute of limitations contained in § 37-1-4 or the three year statute of limitations contained in § 37-1-8 to § 1983 actions. *E.g.*, *Gunther v. Miller*, 498 F.Supp. 882 (D.N.M. 1980); *Bustos v. County of Mora*, No. 81-969-M (D.N.M. Feb. 9, 1982); *Melendrez v. Moore*, No. 80-107-M (D.N.M. March 10, 1980).

This issue needs to be addressed and resolved. There are currently several cases pending before this Court in which the issue of the proper statute of limitations to be applied to § 1983 actions in federal district court in the District of New Mexico has been raised. A review of the approaches taken by the many federal courts which have confronted this question is therefore in order.

A § 1983 claim is, of course, one based on statute. *Board of Regents v. Tomanio*, 446 U.S. 478 (1980). Some states have statutes of limitations which apply specifically to actions "created by federal statute." Where such state statutes exist, federal courts, including the Tenth Circuit, have frequently adopted those statutes of limitations as appropriate for use in § 1983 actions. *E.g.*, *Chambers v. Omaha Public School District*, 536 F.2d 222 (8th Cir. 1976).

⁵The Tenth Circuit was asked to determine the applicable New Mexico statute of limitations for a § 1983 action brought to redress alleged sex discrimination in *Hansbury v. Regents of the University of California*, 596 F.2d 944 (1979). Without discussion, the Court approved the district court's application of the four year statute [now codified in N.M.Stat. Ann. § 37-1-4 (1978)].

In *Spiegel v. School District No. 1, Laramie County*, 600 F.2d 264 (10th Cir. 1979), the Tenth Circuit specifically approved the district court's application of a two year Wyoming statute of limitations for "actions upon a liability created by a federal statute" to a § 1983 action. 600 F.2d at 266.

Federal courts in states with such statutes simply apply to those state statutes of limitations to § 1983 actions once they have determined that the statute of limitations in question is not inconsistent with either the Constitution and laws of the United States or the policies underlying § 1983 actions.⁶ Having once made that determination, these courts bypass any search for a "closely analogous" state cause of action and simply adopt the statute of limitations for "actions created by federal statute" in § 1983 actions. "Courts need not search for a state statute which would apply only in a remotely analogous

⁶In *Robertson v. Wegmann*, 436 U.S. 584 (1978), the United States Supreme Court reiterated the principal policies embodied in 42 U.S.C. § 1983 as deterrence and compensation. In deciding whether a state statute of limitations is consistent with those policies, a court must decide whether the statute of limitations in question permits a plaintiff to "readily enforce [his] claims, thereby recovering compensation and fostering deterrence." *Board of Regents v. Tomanio*, 446 U.S. at 448.

What such a determination entails is ensuring that the state statute of limitations chosen is "sufficiently generous in the time periods to preserve the remedial spirit of federal civil rights actions." *Shouse v. Pierce County*, 559 F.2d 1142, 1146 (9th Cir. 1977). In a recent Tenth Circuit opinion, *Childers v. Independent School District No. 1 of Bryan County*, 676 F.2d 1338 (10th Cir. 1982), the Court held that a six month limitations period set out in Oklahoma's Political Subdivision Tort Claims Act could not be applied to claims brought under 42 U.S.C. § 1983 because it was "inconsistent with the broad remedial purposes of the federal civil rights acts." *Id.* at 1343.

manner if a state statute of limitations is found which clearly governs and is directly related to the federal civil rights claims." *Chambers*, 536 F.2d at 228.

Other courts approach the issue in a slightly different manner. These courts characterize § 1983 actions as "actions created by statute" and then borrow the state statute of limitations for actions founded upon a liability created by statute. The Ninth and Second Circuits have followed this approach.⁷ *E.g.*, *Clark v. Musick*, 623 F.2d 89 (9th Cir. 1980) (*per curiam*); *Shouse v. Pierce County*, 559 F.2d 1142 (9th Cir. 1977); *Donovan v. Reinbold*, 433 F.2d 738 (9th Cir. 1970); *Smith v. Cremins*, 308 F.2d 187 (9th Cir. 1962); *Meyer v. Frank*, 550 F.2d 726 (2d Cir.), *cert. denied*, 434 U.S. 830 (1977); *Romer v. Leary*, 425 F.2d 186 (2d Cir. 1970). The Ninth Circuit, in particular, has stressed the statutory origin of the § 1983 action and has classified it as a species separate and apart from the typical common law tort action available under state law.

Section 1983 of the Civil Rights Act clearly creates rights and imposes obligations different from any which would exist at common law in the absence of a statute The elements of an action under Section 1983 are (1) the denial under color of state law (2) of a right secured by the Constitution and laws of the United States. Neither of these elements would be required to make out a cause of action in a common-law tort; both might be present without creating common-law tort liability.

Smith v. Cremins, 308 F.2d 187, 190 (9th Cir. 1962).

⁷The Seventh Circuit also characterizes § 1983 actions as "actions created by statute." *E.g.*, *Beard v. Robinson*, 563 F.2d 331 (7th Cir. 1977), *cert. denied sub nom Mitchell v. Beard*, 438 U.S. 907 (1978). Accordingly, in § 1983 actions arising in Illinois, the Seventh Circuit applies Illinois' five year statute of limitations governing "all civil actions not otherwise provided for," which statute, under Illinois law, applies to causes of action created by statute. *Id.* at 335-36.

The Ninth Circuit recently modified to some extent its approach to characterizing § 1983 actions as a result of a change in a state statutory provision. In *Kowsikowski v. Bourne*, 659 F.2d 105 (9th Cir. 1981), the Court was faced with an express determination by the Oregon Legislature that the two year statute of limitations contained in the Oregon Tort Claims Act was the appropriate statute of limitations to apply to § 1983 actions. As noted, prior to *Kowsikowski* the Ninth Circuit had consistently characterized § 1983 claims as actions created by statute, and "whenever possible, [borrowed] the statute of limitations for actions founded on a liability created by statute." *Major v. Arizona State Prison*, 642 F.2d 311, 312 (9th Cir. 1981). In fact, in a previous § 1983 action arising in Oregon, *Clark v. Musick*, 623 F.2d 89, 91-92 (9th Cir. 1980) (*per curiam*), the Ninth Circuit had concluded that given a choice between the statute of limitations applicable to causes of action created by statute and the statute of limitations applicable to common law tort actions, the limitations period for statutory causes of action applied to § 1983 actions.

However, the issue was resubmitted to the Ninth Circuit in *Kowsikowski* after the Oregon Legislature expressly amended the Oregon Tort Claims Act. That amendment made the Tort Claims Act specifically applicable to violations of 42 U.S.C. § 1983.⁸

⁸In 1977, the Oregon Legislature amended the last sentence of Or. Rev. Stat. § 30.265(1) to provide:

Subject to the limitations of ORS 30.260 to 30.300, every public body is liable for its torts and those of its officers, employees and agents acting within the scope of their employment or duties, whether arising out of a governmental

(Continued on next page)

Because the issue had been explicitly decided by the Oregon Legislature, the Ninth Circuit no longer found it necessary—or appropriate—to resort to its former practice of characterizing the § 1983 action for the purpose of determining an appropriate state statute of limitations.

Such characterization serves no purpose other than to provide guidance in the selection of the applicable state statute. When the state has expressly made that selection the federal courts should accept it unless to do so would frustrate the purposes served by the federal [civil rights] law. . . .

Kowsikowski, 659 F.2d at 107. However, the Ninth Circuit expressly declined to abandon the practice of characterizing federal civil rights actions in the absence of express legislative determinations such as that contained in the Oregon Tort Claims Act.⁹

The two year statute of limitations contained in the New Mexico Tort Claims Act (NMTCA) is one of the statutes of limitations available to this Court in the case at bar. Unlike the Oregon Legislature, the New Mexico Legislature has given no express legislative directive con-

(Continued from previous page)

or proprietary function. As used in ORS 30.260 to 30.300, "tort" includes any violation of 42 U.S.C. section 1983. (emphasis added).

Those 1977 amendments made the Or. Rev. Stat. § 30.275(3) two-year statute of limitations in the Oregon Tort Claims Act applicable to § 1983 actions. *Kowsikowski*, 659 F.2d at 107.

⁹On rehearing, the Ninth Circuit declined to abandon its former characterization of 42 U.S.C. § 1981 actions in the absence of any express statement by the Oregon Legislature of the kind made regarding § 1983 actions. Absent such clear legislative direction, the Court chose to follow its own precedents "until contrary legislative signals appear." *Kowsikowski*, 659 F.2d at 108 (on rehearing) (*en banc*).

cerning the state statute of limitations to be applied in § 1983 actions. Indeed, the language of the NMTCA indicates that tort actions are actions separate and apart from actions for the redress of federal constitutional rights such as are available under 42 U.S.C. § 1983.

Section 41-4-4(B) of the NMTCA provides that a governmental entity or employee while acting within the scope of his or her duty be defended against a claim for any tort or any violation of property rights or any rights, privileges or immunities secured by the Constitution of the United States. N.M.Stat. Ann. § 41-4-4(B) (Cum.Supp.1981) (emphasis added). Similarly, N.M.Stat. Ann. § 41-4-12 (1978) waives immunity for actions against law enforcement officers acting within the scope of their duties for "[certain specified torts], violation of property rights or deprivation of any rights, privileges or immunities secured by the Constitution and laws of the United States . . ." (emphasis added).

The language in the NMTCA's statute of limitations provision is equally unambiguous. It provides that:

Actions against a governmental entity or a public employee for torts shall be forever barred, unless such action is commenced within two years after the date of occurrence resulting in loss, injury or death

....

N.M.Stat. Ann. § 41-4-15(A) (1978) (emphasis added).

Thus, the plain language of the NMTCA indicates that the Legislature did not intend the term "tort" to include actions arising under § 1983. In construing New Mexico statutes, this Court must do so with the ultimate purpose of ascertaining and giving effect to the manifest intent of the Legislature. N.M.Stat. Ann. § 12-2-2 (1978). No intent

to include § 1983 actions within the meaning of the term "tort" in the NMTCA can be fairly read into the NMTCA as it now stands.

The remaining question, then, is whether the NMTCA provides the most closely analogous state cause of action to one brought under 42 U.S.C. § 1983. The method of characterizing the federal action thus becomes crucial. The United States District Courts for the District of New Mexico have, on several occasions, followed the reasoning of the Ninth Circuit and held that § 1983 actions are *sui generis*, and are not analogous to a cause of action under a state tort claims act. *Gunther v. Miller*, 498 F.Supp. 882 (D.N.M. 1980); *Walker v. Hall*, No. 81-376-M (D.N.M. June 14, 1982); *Johnnie K. v. County of Curry*, No. 81-914-M (D.N.M. April 15, 1982); *Bustos v. County of Mora*, No. 81-969-M (D.N.M. Feb. 9, 1982). See, *Monroe v. Pape*, 365 U.S. 167, 194 (1961) (Harlan, J. concurring), *overruled on other grounds*, *Monnell v. Department of Social Services*, 436 U.S. 658 (1978).

In *Gunther*, this Court adopted the reasoning in *Donovan v. Reinbold*, wherein the Ninth Circuit found the "assumed analogy" between the federal right created by the Civil Rights Act and any state-created remedies and immunities to be "ephemeral." *Donovan*, 433 F.2d 738 (9th Cir. 1970). The Court in *Donovan* viewed the California Tort Claims Act as the

legislative response to [a California Supreme Court decision] abrogating common law governmental immunity from tort liability. [The] Act abolished all court declared and common law based forms of tort liability of public entities in the state with some exceptions, and substituted therefor a statutory system

of liabilities and immunities, together with a procedural scheme to enforce the system.

Id. at 741. The Ninth Circuit went on to say that Congress had never shown its intention to defer to the states' remedies or procedures for vindication of § 1983 rights.

[Congress] has never indicated an intent to engraft onto the federal right state concepts of sovereign immunity or of state susceptibility to suit, which are the concepts which are the roots of the California Tort Claims Act. Indeed, the history of § 1983, summarized in *Monroe v. Pape*, [365 U.S. 167 (1961)], vividly demonstrates that state concepts of sovereign immunity were alien to the purposes to be served by the Civil Rights Act.

Id. at 742. See also *Gunther v. Miller*, 498 F.Supp. at 884.

Defendants in the case at bar ask this Court to reconsider its holding in *Gunther v. Miller*. They argue that, unlike the California Tort Claims Act, the NMTCA embraces both common law torts and federally protected constitutional rights without either singling out the federal rights for harsher treatment than the state-protected rights or intertwining the limitations period with state tort claims procedures.

These factors may indeed distinguish the NMTCA from the California Tort Claims Act scrutinized in *Donovan*. However, those differences don't undermine the basic premise taken by the Ninth Circuit in *Donovan* and by courts in this and other districts that § 1983 actions are "a bird of a different species, apart and unique from a state statutory cause of action brought under [a state tort claims act.]" *Walker v. Hall*, No. 81-376-M, slip op. at 3 (D.N.M. June 14, 1982). Absent an express legislative determination which would preclude the necessity of characterizing the § 1983 action for purposes of choosing an ap-

propriate state statute of limitations, the reasoning adopted from *Donovan* still appears to be persuasive.

Defendants, however, urge this Court to adopt an approach to characterization of § 1983 actions based on the underlying conduct alleged in the § 1983 action. Courts using such an approach to characterization classify that underlying conduct according to the most closely related cause of action available under state law. The state statute of limitations applicable to that analogous state cause of action is then applied to the § 1983 action. The Third Circuit has consistently followed this approach and, until recently, the Eighth Circuit also occasionally characterized § 1983 actions in this manner. *E.g., Ammlung v. City of Chester*, 494 F.2d 811 (3d Cir. 1974); *Savage v. United States*, 450 F.2d 449 (8th Cir. 1971), *overruled by Garmon v. Foust*, 668 F.2d 400 (8th Cir.), *cert. denied*, — U.S. — (1982).

The New Mexico courts recently adopted a similar analysis in *DeVargas v. State of New Mexico*. In *DeVargas*, plaintiff sought damages in state court under 42 U.S.C. § 1983 for the alleged deprivation of his constitutional rights. Plaintiff alleged that he had been beaten by employees of the New Mexico Department of Corrections while incarcerated at the New Mexico Penitentiary.

The New Mexico Court of Appeals held that the controlling limitations period for § 1983 actions brought in state court in New Mexico is the two year period set out in the NMTCA at N.M.Stat. Ann. § 41-4-15(A)(1978). *DeVargas v. State of New Mexico*, 21 N.M. St. Bar Bull. 302 (March 18, 1982), Ct. App. No. 5062 (filed October 1, 1981). Petition for writ of certiorari to the New Mexico Supreme Court was first granted, then quashed as im-

providently issued. The Supreme Court held that the most closely analogous state cause of action to a 42 U.S.C. § 1983 cause of action is "provided by the New Mexico Tort Claims Act under Section 41-4-12 N.M.S.A. 1978." *DeVargas v. State of New Mexico*, 21 N.M. St. Bar Bull. 549, 550 (May 6, 1982). Thus, the Supreme Court concluded that the applicable statute of limitations for § 1983 actions would be the two year limitations period set out in § 41-4-15 of the NMTCA.

It certainly is desirable to designate one uniform statute of limitations to be applied to all § 1983 actions arising in New Mexico. However, while this Court has great respect for the courts of the State of New Mexico, it must nevertheless respectfully dissent from the choice made by the New Mexico Supreme Court. The New Mexico Supreme Court's holding on this issue is not binding here. As noted earlier, the characterization of the nature of the right being vindicated under § 1983 is a matter of federal, rather than state, law. *Donovan v. Reinbold*, 433 F.2d 738 (9th Cir. 1970); *Johnnie K. v. County of Curry*, No. 81-914-M (D.N.M. April 15, 1982). See also *Auto Workers v. Hoosier Corp.*, 383 U.S. 696, 706 (1966).

That is not to say that the method of characterization adopted in *DeVargas* is not without appeal. Classifying § 1983 actions according to the underlying conduct of the defendant appears to be an attractive solution to the difficult problem of characterization. Courts are frequently faced with cases involving fact patterns similar to that before the New Mexico courts in *DeVargas*: alleged deprivation of constitutional rights committed by law enforcement or corrections officers under color of state law. In such cases, cogent arguments can be made that NMTCA

claims are most closely analogous to those types of § 1983 claims.

Difficulties arise, however, when § 1983 actions occur in a context removed from law enforcement settings. Where the court is faced with a § 1983 action in which, for instance, a discharged teacher bases his or her § 1983 claim for wrongful discharge against a school board on the alleged exercise of free speech as protected by the First and Fourteenth Amendments, as in *e.g.*, *Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1977), the analogy adopted by the New Mexico Supreme Court is much more difficult to sustain. See also *Hansbury v. Regents of University of California*, 596 F.2d 944 (10th Cir. 1979), where the plaintiff claimed that defendant discriminatorily denied her recall rights and refused to rehire or hire her following a layoff.

Attempting to characterize § 1983 actions according to the underlying conduct of the defendant might well result in several different statutes of limitations being applied to § 1983 actions in federal district court in New Mexico. Differing analogies would be drawn between § 1983 actions and various state remedies, depending on the nature of the facts comprising the § 1983 claim. Such a result would be highly unsatisfactory. As stated by the Ninth Circuit in *Smith v. Cremins*, 308 F.2d at 190:

Inconsistency and confusion would result if the single cause of action created by Congress were fragmented in accordance with analogies drawn to rights created by state law and the several differing periods of limitation applicable to each state-created right were applied to the single federal cause of action.

In summary, after considering all the options and approaches available, it appears that § 1983 actions are best

characterized as actions based on statute. Because there is no specific New Mexico statute of limitations governing § 1983 actions or actions based on statute, it is the Court's conclusion that the best approach is to borrow the four year statute of limitations period contained in N.M. Stat. Ann. § 37-1-4 (1978) which governs "all other actions not . . . otherwise provided for."¹⁰ Plaintiff's action in the case at bar is therefore found to be timely filed. An Order will be entered in accordance herewith, which will certify the statute of limitations issue in this case pursuant to 28 U.S.C. § 1292(b).

/s/ Howard C. Bratton
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CIV NO. 82-092 HB

GARY GARCIA,

Plaintiff,

vs.

RICHARD WILSON, individually,
and MARTIN VIGIL, individually,

Defendants.

¹⁰A similar approach was taken by the Eighth Circuit Court of Appeals in *Garmon v. Foust*, 668 F.2d 400 (8th Cir.), cert. denied, — U.S. — (1982), where the Court was faced with reconciling inconsistent holdings in that Circuit as to the applicable statute of limitations for civil rights actions arising in Iowa. The Court rejected the tort analogy "because it unduly cramps the significance of § 1983 as a broad, statutory remedy." *Id.* The Court applied the general statute of limitations applicable to causes of action not specifically governed by other statutes of limitations rather than the two year statute for actions "founded on injury to person or reputation." *Id.* at 405-06.

O R D E R

Filed July 21, 1982

This matter having come before the Court on defendants' motion to dismiss plaintiff's action under 42 U.S.C. § 1983 on the grounds that plaintiff's action is barred as untimely filed by the statute of limitations contained in the New Mexico Tort Claims Act, N.M.Stat. Ann. § 41-4-15(A), and the Court having entered a Memorandum Opinion herein; NOW, THEREFORE,

IT IS ORDERED that defendants' notice to dismiss be, and hereby is, denied.

The Court is further of the opinion that this matter involves a controlling question of law as to which there is substantial ground for differences of opinion and that an immediate appeal from the Order entered herein may materially advance the ultimate termination of the litigation.

/s/ Howard C. Bratton
Chief Judge

APPENDIX C**CONSTITUTIONAL PROVISIONS AND
STATUTES INVOLVED****42 U.S.C. § 1983****§ 1983. Civil action for deprivation of rights**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subject, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1988**§ 1988. Proceedings in vindication of civil rights; attorney's fees**

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses

against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fees as part of the costs.

N.M. Stat. Ann. § 41-4-12 (1978)**41-4-12. Liability; law enforcement officers.**

The immunity granted pursuant to Subsection A of Section 41-4-4 NMSA 1978 does not apply to liability for personal injury, bodily injury, wrongful death or property damage resulting from assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, defamation of character, violation of property rights or deprivation of any rights, privileges or immunities secured by the constitution and laws of the United States or New Mexico when caused by law enforcement officers while acting within the scope of their duties.

N.M. Stat. Ann. § 41-4-15 (1978)**41-4-15. Statute of limitations.**

A. Actions against a governmental entity or a public employee for torts shall be forever barred, unless such action is commenced within two years after the date of occur-

rence resulting in loss, injury or death, except that a minor under the full age of seven years shall have until his ninth birthday in which to file. This subsection applies to all persons regardless of minority or other legal disability.

B. The provisions of Subsection A of this section shall not apply to any occurrence giving rise to a claim which occurred before July 1, 1976.

N.M. Stat. Ann. § 37-1-4 (1978)

37-1-4. [Accounts and unwritten contracts; injuries to property; conversion; fraud; unspecified actions.]

Those founded upon accounts and unwritten contracts; those brought for injuries to property or for the conversion of personal property or for relief upon the ground of fraud, and all other actions not herein otherwise provided for and specified within four years.

N.M. Stat. Ann. § 37-1-8 (1978)

37-1-8. Actions against sureties on fiduciary bonds; injuries to persons or reputation.

Actions must be brought against sureties on official bonds and on bonds of guardians, conservators, personal representatives and persons acting in a fiduciary capacity, within two years after the liability of the principal or the person from whom they are sureties is finally established or determined by a judgment or decree of the court, and for an injury to the person or reputation of any person, within three years.
